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No. 429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BENTON COUNTY, OREGON, et al., *Petitioners*

v.

A. W. LAFFERTY, RICHARD L. MERRICK, and ROBERT B. ANDERSON, Secretary of the Treasury, et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Benton County, Columbia County, Coos County, Curry County, Douglas County, Jackson County, Josephine County, Klamath County, Lane County, Lincoln County, Linn County, Marion County, Multnomah County, Polk County, Tillamook County,

Washington County and Yamhill County, all of the State of Oregon, political subdivisions of that State and capable of suing and being sued in their own name, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on June 13, 1957.

OPINIONS BELOW

The District Court granted summary judgment in favor of petitioners. There was no officially reported opinion, but the Court's memorandum opinion is printed in Appendix A hereto at page 1a. The opinion of the Circuit Court of Appeals of June 13, 1957, reversing, has not yet been officially reported but is printed in Appendix A hereto at page 2a.

The prior opinion upon which the Court's decision in the instant case rests is *Clackamas County, Ore.* v. *McKay,* 94 U.S. App. D.C. 108, 219 F. 2d 479 (1954). Certiorari in that case was granted, the judgment of the Court of Appeals was vacated, and the case remanded with instructions to dismiss as moot. *McKay* v. *Clackamas County, Ore.,* 349 U.S. 909 (1955). For convenience this prior opinion of the Court of Appeals is printed in Appendix C hereto at page 15a. The order of this Court is also printed in Appendix C hereto at page 55a.

JURISDICTION

The judgment of the Circuit Court of Appeals reversing the judgment of the District Court was entered on June 13, 1957 (Appendix A at page 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

The question presented is whether the Court of Appeals may appropriately award attorneys' fees, for prosecuting a suit which this Court ordered dismissed as moot, out of a fund in the Treasury of the United States ordered distributed to eighteen Oregon counties by an Act of Congress, and whether, in any event, such public monies should be so taxed with a private fee on the theory that the efforts of the respondent lawyers incidentally and indirectly influenced the passage of the legislation under which the fund was distributed?

STATUTES INVOLVED

Two statutory provisions are involved. The first is the Act of June 24, 1954, 68 Stat. 270-271, 43 U.S.C. § 1181g. This is the statute which rendered the original *Clackamas* litigation moot. The statute is printed in Appendix B hereto at page 10a. The second statute, under which the original *Clackamas* litigation was commenced, is the Act of August 28, 1937, 50 Stat. 874. This Act was amended by the Act of June 24, 1954. The Act of August 28, 1937, as it existed prior to its amendment, is reproduced in Appendix B hereto at page 12a.

STATEMENT

On June 15, 1954, respondents A. W. Lafferty and Richard L. Merrick, members of the bar, filed a suit in the United States District Court for the District of Columbia seeking $600,000.00 as attorneys' fees. These fees were sought for services performed by them in the prosecution of an action on behalf of Clackamas County, Oregon, against the Secretary of

the Interior and the Secretary of Agriculture which sought to compel the distribution of a special fund in the Treasury of the United States to eighteen Oregon and California Railroad land grant counties in the State of Oregon. Clackamas County was one of this class, and the petitioners herein the other seventeen. (R. 12) See *Clackamas County, Ore.* v. *McKay,* 94 U.S. App. D.C. 108, 219 F. 2d 479 (1954), ordered dismissed as moot, 349 U.S. 909 (1955).

The suit for attorneys' fees named as defendants the incumbents, the Secretary of the Treasury,[1] the Secretary of the Interior and the Secretary of Agriculture, who were alleged to be in control of the special fund. The other defendants were the counties who were alleged to be the beneficiaries of the fund.[2]

By reason of the events which transpired after the commencement of the attorneys' fee suit, petitioners contended that they did not receive or accept benefits as a direct result of the labors of these respondent lawyers, and hence it was improper to charge them with liability for attorneys' fees. (R. 14)

The District Court agreed and entered summary judgment for these petitioners. (R. 27) That Court's memorandum opinion is contained in Appendix A at page 1a. The Court of Appeals for the District of Columbia Circuit disagreed and reversed. Its opinion, which has not yet been officially reported, is printed in Appendix A at page 2a.

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[1] Robert B. Anderson has been substituted for Geo. M. Humphrey. (Supp. Rec.)

[2] Clackamas County was named at first as a defendant. Subsequently, however, Lafferty and Merrick dismissed as to that county on the ground that Clackamas had agreed to pay them a fee. Only Clackamas County had retained these lawyers. (R. 8, 13)

A history of the *Clackamas* litigation is necessary to an understanding of this case. For many years there had existed an interdepartmental dispute as to whether approximately 462,000 acres of public land in Oregon were "revested Oregon & California Railroad grant lands," or forest preserves.[3] If the lands were "O & C" lands, seventy-five percent of their profits were to be paid the counties in which they were situated in accordance with a formula in the Act of August 28, 1937, 50 Stat. 874. If they were forest lands, only twenty-five percent was payable to the counties. (See 16 U.S.C. §§ 499-501). By agreement between the Secretary of Agriculture and the Secretary of the Interior, profits from this disputed acreage were accumulated in a special deposit fund account in the Treasury to await a determination of the controversy.

Clackamas County sued to compel the Secretary of the Interior to assume jurisdiction over the lands, to restrain the Secretary of Agriculture from asserting jurisdiction and to compel a distribution of the fund in accordance with the formula contained in the Act of August 28, 1937, 50 Stat. 874.

The Secretaries moved to dismiss for want of jurisdiction in the District Court, asserting that the action was, in reality, one against the United States to which it had not consented. The District Court agreed and dismissed. An appeal was taken by Clackamas County to the United States Court of Appeals for the District of Columbia Circuit. That court reversed. It

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[3] An exposition of the dispute was contained in the Petition for A Writ of Certiorari, filed by the Solicitor General in *McKay* v. *Clackamas County*, No. 604, Oct. Term 1954, pp. 5-7.

decided on April 30, 1954, not only that the District Court possessed jurisdiction but, going to the merits, that the disputed acreage was in fact revested Oregon & California Railroad grant land. It accordingly ordered a distribution of the special account. *Clackamas County* v. *McKay*, 94 U.S. App. D.C. 108, 219 F. 2d 479 (1954).[4]

Following the apparent success of the *Clackamas* action, respondents Lafferty and Merrick prematurely commenced their present suit, contending that their efforts had resulted in substantial benefits to all eighteen counties, and that they were therefore, in equity, entitled to a fee. (R. 1, 4)

Their apparent success, however, was short-lived. The Secretaries had filed a timely petition for rehearing asserting that the Court of Appeals had improperly decided the merits of the controversy when they had not been afforded either an opportunity to answer or argue on the merits. (See Petition for Writ of Certiorari, *McKay* v. *Clackamas County, Ore.*, No. 604, Oct. Term, 1954, pp. 8, 9).

While this petition was pending, Congress resolved the dispute by the Act of June 24, 1954, 68 Stat. 270, 43 U.S.C. 1181g. This statute declared the lands in controversy to be revested railroad grant lands and ordered the special account distributed in accordance with the Act of August 28, 1937, 50 Stat. 874, "as amended."[5]

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[4] The full text of this opinion is set forth in Appendix C at page 15a.

[5] The Act of August 28, 1937, provided that "O & C" monies were distributable to the counties in the proportion to which the 1915 assessed valuation of such lands in each county possessed to

The petitioners attempted to intervene in the Court of Appeals to suggest that the new statute had rendered the *Clackamas* suit moot. On August 12, 1954, the Secretaries moved the Court to vacate its judgment and to remand with instructions to dismiss as moot.

On October 21, 1954, the Court of Appeals entered several orders. It denied petitioners leave to intervene. It refused to hold that the controversy was mooted by virtue of the Act of June 24, 1954. Acting upon the pending petition for rehearing, the Court vacated, as improvidently entered, so much of its April 30, 1954, opinion as decided the merits of the controversy. It remanded the case to the District Court for joinder of issue. 94 U.S. App. D.C. at p. 126, 219 F. 2d at p. 497, Appendix C at page 50a.

At this point there was no judgment of any court which ordered a distribution of the special fund. The counties had neither received nor accepted any direct benefit from the *Clackamas* litigation.

The Secretaries petitioned this Court for a writ of certiorari to review the refusal of the Court of

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the total 1915 assessed value of all "O & C" lands in the state. Since the disputed acreage had been included in the forest preserves prior to 1915, it possessed no assessed valuation for that year and hence could not be counted in the proportion for distribution. The amendment assigned an average assessed valuation to the controverted acreage. By including this figure in the computations, the amounts due each county changed, since the disputed acreage was, of course, not equally divided among the counties. The fund total was not changed. Some counties, however, profited by the change in formula while others received substantially less. The Court of Appeals has consistently refused to appreciate this fact. The counties which received less certainly have not benefitted on account of the legislation, and hardly owe a fee to Lafferty and Merrick by reason of that fact.

The text of the Act of August 28, 1937, prior to its amendment, is contained in Appendix B at page 12a.

Appeals to consider that the *Clackamas* action was moot by virtue of the new statute. This Court granted certiorari, vacated the judgment of the Court of Appeals and remanded with instructions to dismiss as moot. *McKay* v. *Clackamas County, Ore.*, 349 U.S. 909 (1955).

The special fund was distributed pursuant to the command of the new statute.[6] Meanwhile, Lafferty and Merrick, who had opposed the passage of the Act of June 24, 1954 (See hearings before Sen. Comm. on Interior & Insular Affairs on S. 2225, 83rd Cong. 2d Sess., pp. 17, 19), filed on behalf of Clackamas County a new suit attacking the constitutionality of the new statute. This resulted in failure. See *Clackamas County, Ore.* v. *McKay*, 96 U.S. App. D.C. 385, 226 F. 2d 343 (1955).

Petitioners moved in the present action for summary judgment, contending that the efforts of Lafferty and Merrick in the *Clackamas* litigation had not resulted in any direct benefit to them, and that since the litigation did not bring about the distribution of the special fund, the fund should not be taxed with attorneys' fees. (R. 14) Respondents Lafferty and Merrick filed a counter-motion for summary judgment. (R. 19) The government officials filed a statement taking no position on the merits.

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[6] The payment which was made followed the institution of a suit by the petitioners to compel compliance with the new statute. *Benton County, Ore., et al.* v. *McKay, et al.*, D.C. D.C., No. 175-55. Whether the payment was a voluntary compliance with the statute, as seems more likely, or a result of the *Benton County* suit is immaterial. Concededly, however, distribution was made under the Act of June 24, 1954. See Petition for Writ of Certiorari, No. 604, Oct. Term, 1954, page 10.

$600,000.00 was withheld from distribution, however, to answer the contingencies of the present suit.

The District Court denied the attorneys' motion for summary judgment and granted the petitioners'. The Court stated: (App. A, p. 1a)

> "It is my opinion that the services rendered by the plaintiffs did not produce any benefit to the seventeen counties but that the fund in which they shared was the product of legislation which, in fact, the plaintiffs opposed; that since the litigation which the plaintiffs conducted did not benefit the seventeen counties, they are not liable for attorneys' fees on the asserted principle that the plaintiffs created the fund in which the seventeen counties shared."

The Court of Appeals disagreed. It stated: "To say that it [the litigation] did not result in such a benefit seems to us little more than a play on words." By two references to the Congressional Record, one of which seemed obviously "inspired", the Court of Appeals concluded that the litigation had influenced and been responsible for the passage of the legislation. It found that the counties had received such "benefit" as to subject the fund to a charge for attorneys' fees. The case was "remanded for the determination of the proper amount of fees to be paid these appellant lawyers from the fund retained in the hands of the Government."

It had been argued in both courts below that it was contrary to public policy to award attorneys' fees for directly or indirectly influencing the passage of favor legislation. The Court of Appeals neither considered nor alluded to this argument. The Court treated its April 30, 1954, opinion as definitive of the character of the lands in question, ignoring the fact that it subsequently had vacated so much of that opinion as had

treated of the merits. It ignored the import of this Court's order upon the *Clackamas* opinion. In a novel exercise of the Court's authority to award fees, it has subjected public monies appropriated for a specific legislative purpose to a private charge. It has made, at the appellate level, a factual determination that the efforts of the two respondent lawyers were productive of legislation, thereby foreclosing any opportunity to offer evidence on the subject.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because:

(1) The judgment of the Circuit Court of Appeals is in conflict with the order of this Court of April 18, 1955, (349 U.S. 909).

(2) A federal court's award of attorneys' fees, out of public monies appropriated for a specific purpose, for influencing the passage of favor legislation raises such grave questions of public policy as to call for review by this Court.

(3) The factual determination on an appellate level of a causal connection between the *Clackamas* litigation and subsequent favor legislation so far departs from the accepted judicial standards as to call for an exercise of this Court's supervisory jurisdiction.

1. The Conflict With This Court's Order

The Act of June 24, 1954, effectively deprived the Circuit Court of Appeals of further jurisdiction over the *Clackamas* suit. A new legislative command had intervened which required observance. The court was, accordingly, powerless to order compliance with the prior statute. See *Public Util. Commrs.* v. *Compania*

General, 249 U.S. 425, 426 (1919). The original *Clackamas* action sought to have determined the character of the disputed acreage and to have distributed the accumulated profits therefrom in accordance with a specific formula. Before the controversy had been finally determined, legislation changed the formula and fixed the character of the land. The dispute was beyond point of argument, and the court was powerless to make any different determination. In short the case had become moot. *Norwegian Co.* v. *Tariff Comm.*, 274 U.S. 106, 112 (1927). Moreover, the new statute prevented any effective review by this Court of the issues raised. Yet a serious question existed, recognized within the Court of Appeals itself, whether its opinion was in conflict with this Court's decision in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

Congress was free to change the law despite the comment of the Court of Appeals to the contrary. Congress possesses the authority to alter the distribution of undisbursed money representing the proceeds of land belonging to the United States, especially since the prior provisions for payment to the counties represented a gratuity and created no vested rights. *Maricopa County* v. *Valley Bank*, 318 U.S. 357, 361-362 (1943); *Frisbie* v. *United States*, 157 U.S. 160, 166 (1895).

Accordingly the *Clackamas* suit was rendered moot as this Court so declared. Once the action was dismissed as moot, the situation was as if the case had never been brought. The case was nullified from its inception. Orders and judgments were of no validity and opinions were not controlling. This Court has held that no prejudice may arise to inflict any party

by reason of a case which becomes moot. *United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950). A dismissal as moot operates to eliminate a judgment "review of which was prevented through happenstance." 340 U.S. at p. 40.

An award of attorneys' fees is usually an exercise of ancillary jurisdiction. See *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939); *Washington Gas Light Co.* v. *Baker,* 90 U.S. App. D.C. 98, 195 F. 2d 29 (1951). Yet this jurisdiction obviously cannot be exercised in a moot case.

Attorneys' fees, moreover, are customarily awarded because the litigation undertaken by one of a class is successful and directly benefits the other members of the class who, if they accept the bounty, are bound in equity to assist in defraying the cost of producing it. *Sprague* v. *Ticonic National Bank, supra; Trustees* v. *Greenough,* 105 U.S. 527 (1882). However, under the circumstances of this case it cannot be maintained that Clackamas County produced a fund for the benefit of her sister counties, and that they have accepted its proceeds.

In this instance the Court of Appeals persists in attaching validity to its April 30, 1954, opinion, even though this Court ordered its judgment vacated and the case dismissed as moot.[7] The Court of Appeals'

[7] The Court of Appeals had itself refused to hold that the case was moot. It did so because it did not appear to the Court that the money had been paid to the counties, and the Court observed that the new statute had not changed the method of distribution. The Court was factually in error on the second ground, and legally wrong on the first. The new statute did change the formula of distribution. Congress, having resolved the issue that was before the Court, and having directed the defendants in the

opinion refers to its "decree" and suggests that the special account was distributed in compliance with its order. It has ignored the fact, however, that it withdrew so much of its April 30, 1954, opinion as decided the merits of the controversy. But in addition, the effort to invest its opinion and judgment with vitality is in conflict with this Court's order of April 18, 1955.

Once Congress had declared, as it was free to do, that the lands in question were "revested Oregon & California Railroad grant lands," the District Court on remand would not have been free to find otherwise, nor would this Court have been free to do so upon review here. The main issue in the *Clackamas* case was, therefore, resolved. The case was moot. The slate was wiped clean. The requisites for awarding a fee, success and a direct benefit from the litigation, usually the existence of a fund, were not present. See *Thomas v. Peyser*, 73 App. D.C. 155, 118 F. 2d 369 (1941). If the erasures were made in the record which should occur when a case becomes moot, then these counties cannot be charged with profiting from the results produced by these lawyers. Unless they are entitled to a fee for producing legislation (about which see *infra*, 2), there is no basis for the judgment below. The beneficence received by the petitioners came from public legislation. The attempt to

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Clackamas case to make payment, the Court was powerless to further adjudicate the questions posed by the pleadings before it. The fact of payment, which was compliance with the statute, was immaterial. See Petition for Writ of Certiorari, *McKay, et al. v. Clackamas County, Ore.*, No. 604, Oct. Term 1954, pp. 14, 15. However, it is only this Court which, in the last analysis, can state whether it found the *Clackamas* case moot by reason of the legislation or by reason of the payment, a distinction which the Court of Appeals finds so important.

attribute the distribution of the fund to the *Clackamas* litigation is to give that litigation some lingering vital significance contrary to this Court's order of dismissal.

The Court of Appeals improperly found and stated that the monies were paid pursuant to its judgment. In addition to there being no judgment outstanding at the time of payment which would have required it, the Secretaries had vigorously opposed the correctness of the April 30, 1954 opinion by filing a timely petition for rehearing and by questioning in their Petition for Writ of Certiorari the legal validity of that opinion. See Petition, No. 604, Oct. Term, 1954, p. 17. There is, therefore, no factual basis for the statement in the Court of Appeals' opinion that "a party does not nullify a court order by complying with it." The monies were paid pursuant to the direction of the statute, not the Court's order. See Petition, No. 604, Oct. Term, 1954, at pp. 10, 14.

To attribute, as does the Court of Appeals, the distribution of the fund to the abortive litigation before it is to deny that inexistence which this Court's order, vacating the judgment of the Court of Appeals and remanding with instructions to dismiss as moot, should have created.

2. The Award Offends Public Policy

The effect of the Court of Appeals' opinion is to award a fee for indirectly influencing the passage of favor legislation and to divert a portion of public funds for a private purpose. This is so offensive to public policy as to call upon this Court's power of review. Despite the attempt of the Court of Appeals to attribute passage of the Act of June 24, 1954, to its April 30, 1954 opinion, the special fund was not

distributed pursuant to any order of Court, but rather under the statutory command. Any influence which the Court of Appeals' opinion had upon the passage of the legislation was incidental and indirect.

It has heretofore been considered that incidental and indirect benefits do not support an allowance of attorneys' fees. *Jett* v. *Merchants & Planters Bank*, 228 F. 2d 156, 159 (4 Cir., 1955); *Simmons* v. *Friday*, 190 F. 2d 849, (8 Cir., 1951); *Thomas* v. *Peyser*, 73 App. D.C. 155, 118 F. 2d 369 (1941); *Wallace* v. *Fiske*, 80 F. 2d 897 (8 Cir., 1936); *Davis* v. *Seneca Falls Mfg. Co.*, 17 F. 2d 546, 549 (2 Cir., 1927); *Lamar* v. *Hall & Wimberly*, 129 Fed. 79, 84 (5 Cir., 1904). It is only when the benefits derived from litigation are direct and substantial that it is appropriate to "tax costs between solicitor and client." *Thomas* v. *Peyser*, *supra*; *Schechtman* v. *Wolfson*, 244 F. 2d 537 (2 Cir., 1957). Even then, "such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Sprague* v. *Ticonic National Bank*, 307 U.S. at page 167. The Court of Appeals has, therefore, in the first instance departed from established equity practice in awarding fees for incidental and indirect benefits.

However, since the alleged incidental benefit in this case is the influencing of favor legislation, public policy is offended by the awarding of a fee. It has long been settled that a contingent fee contract for influencing or attempting to influence the passage of favor legislation is void and unenforceable as against public policy. Whether the means to be used contemplate improper influences is immaterial, and even though part of the contract contemplates the performance of proper legal services, if any part in-

volves the attempt to procure legislative relief, the entire agreement is void.[8] See *Marshall* v. *Balto. & Ohio R. Co.*, 16 How. 314 (1854); *Tool Co.* v. *Norris*, 2 Wall. 45 (1865); *Trist* v. *Child*, 21 Wall. 441 (1875); *Hazelton* v. *Sheckells*, 202 U.S. 71 (1906); *Textile Mills Corp.* v. *Comm'r*, 314 U.S. 326, 338-339 (1941); *Brown* v. *Gesellschaft Fur Drahtlose Telegraphie*, 70 App. D.C. 94, 104 F. 2d 227 (1939); *Noonan* v. *Gilbert*, 63 App. D.C. 30, 68 F. 2d 775 (1934).

The reasons for this rule readily come to mind. If money is appropriated for a public purpose, a portion of it should not be diverted for private gain. The temptation engendered by the hope of a large recovery contingent upon success may breed corruption. Improper motives may influence the legislative process. (See cases just cited.)

If a contingent fee contract to influence the passage of legislation is so offensive to public policy as to be unenforceable, by what right does a court fashion one by implication for the parties? The principle should not change depending upon whether the influence exerted is direct or indirect. If such an exception to the rule were created, subtle or devious imagination

[8] In *Trist* v. *Child*, 21 Wall. 441 (1875) it appeared that the lawyer involved was engaged to make a proper legal presentation of the merits of his client's case, but his undertaking did incidentally involve a certain amount of lobbying. In answer to the contention made in that case that a fee should be awarded for the proper work which was performed, this Court said, "That which is bad destroys that which is good and they perish together." In this case the affidavit of A. L. Lafferty, filed in support of his claim for a fee, discloses that this respondent seeks compensation in part for his time spent in appearing before a committee of Congress. (R. 17)

could as readily accomplish the forbidden purpose as if there were no rule at all. The awarding of a fee for indirectly influencing legislation is, as a principle, just as capable of diverting public funds, or inspiring the avaricious and of contaminating the legislative process as is any direct effort.

If it is said on the other hand that these lawyers had no intention of influencing legislation, rather they, unwittingly by their law suit, called the matter to the attention of Congress, the award of a fee would still be offensive to public policy.

The sources from which Congress is informed as to the need for corrective legislation are endless. A fee should not be paid the informer because he is a lawyer. It is inappropriate to look behind the legislation when the purpose is to charge its benefits with a fee. Whether, therefore, Congress was prompted to pass the legislation by the *Clackamas* litigation should be immaterial.

A great deal of so-called "indemnity" or "favor" legislation is continually before the Congress. The salutary principle that a fee should not be awarded for procuring or influencing the passage of such legislation should not be subverted because the influence proceeds from a pending law suit. Two examples will serve to illustrate the impropriety of the principle announced by the Court of Appeals. A tort claim action is filed on behalf of one whose property rights are adversely effected by some governmental activity. The suit is unsuccessful. Congress decides that public morals require that indemnity be afforded those who, like the plaintiff, are adversely effected by the particular activity. Is the lawyer who filed the case to

be entitled to a fee from all those who benefit as a result of such legislation? A tax ruling is unsuccessfully challenged in the courts, but Congress, deciding that the ruling is inequitable, changes the law. Is the lawyer for the taxpayer to be entitled to a fee from all those who benefit from this remedial legislation? The proper result would be for the lawyer to seek fair compensation from his client for the work and labor performed.

The practice of awarding fees under the suggested circumstances, and under the circumstances of this case, would encourage spurious litigation. It would burden the public treasury by adding an additional charge to public appropriations. The general benefits which accrue to the public from the interacting influences of legislation and judicial decision would bear a dear price tag. Difficult and unseemly questions as to whether the judicial or legislative process was responsible for the benefits which accrue would occur. The principle in practice would encourage the forbidden "kickback." It would reflect upon the motives of public officials[9] and would in general bring the legislative process into public disrepute.

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[9] For example, it would appear in this case, from the quotations relied upon by the Court of Appeals, that Rep. Wickersham in his questioning of Rep. Ellsworth was more motivated by a desire to aid a former colleague than by the propriety of the legislation.

In support of its assertion that the Act of June 24, 1954, was the product of the *Clackamas* litigation, the Court of Appeals relied upon the following colloquy which occurred on the floor of the House of Representatives, 100 Cong. Rec. 7969.

"MR. WICKERSHAM. Mr. Speaker, reserving the right to object, and I make this reservation at the request of two of our former colleagues, I would like to ask the gentleman from Oregon. [Mr. Ellsworth] a question. This measure is a fol-

The possibilities for mischief are so great that this Court should declare an attempt, such as is involved in this case, to impress a legislative benefit with a private charge as contrary to public policy.

3. Appellate Fact Finding

The Court of Appeals found as a fact that the Act of June 24, 1954, was a product of its April 30, 1954 opinion. Thus the petitioners, by this departure from customary appellant procedure, have been precluded from arguing or offering evidence upon this point.

The difficulty of proving the causal nexus between the opinion and the legislation attests to the necessity for not making the inqury at all. Assuming, however, that it is an appropriate issue, the Court of Appeals should have left it for determination of the trial court, under circumstances where witnesses could be called and cross-examined, and evidence, documentary and otherwise, could be offered. The Court of Appeals seems content to find that because a member of the

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lowup and confirms a decision of the District of Columbia Circuit of the United States Court of Appeals on April 30, 1954, in which action A. W. Lafferty, a former Member of Congress, represented Clackamos [sic] County, Oreg., and others and won the decision. Is this correct?

"Mr. ELLSWORTH. That is correct.

...

"Mr. WICKERSHAM. Is it a fact that this bill confirms the decision of the court of appeals which directed the payment of $7 million or $8 million to 18 Oregon counties, including Clackmos [sic] County, all of which 18 counties thereby benefiting by the action instituted by A. W. Lafferty, as attorney, and benefited from the said court decision? This is correct, is it not?

"Mr. ELLSWORTH. That is correct."

These questions would appear to be designed to make just the sort of record necessary to support a claim for a fee, assuming the principle espoused by the Court of Appeals is correct.

Senate and a member of the House of Representatives stated that the bill, which he was advocating, made the same determination with respect to the character of public lands as had the Court of Appeals, that all the other members of both houses were motivated in their votes by a desire to confirm the Court's opinion, and that the President in signing the bill was likewise so motivated.

The references by the sponsors of the bill to the Court of Appeals' April 30, 1954 opinion were in the nature of "make-weight" arguments. The character of the lands in question had been the subject of a dispute for many years between the Department of Agriculture and the Department of the Interior. This dispute and the inability to obtain a solution had prevented earlier legislative attempts to fix the true character of the disputed acreage.[10] In March of 1954, a month before the opinion of the Court of Appeals, both departments expressed their approval of the bill which became the Act of June 24, 1954. See Sen. Rep. 1314, 83rd Cong., 2d Sess. The resolution of this interdepartmental dispute assured early passage of the bill quite apart from any influence which the opinion of the Court of Appeals may have had.

In any event, it was inappropriate for the Court of Appeals to make such a factual determination when a hearing on that issue had not occurred in the trial court. If a fee is to be awarded for procuring the passage of favor legislation, the parties who are asked to pay the fee should be afforded an opportunity to prove, if they can, that the legislation was not the result of the influences claimed.

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[10] See Petition for Writ of Certiorari, *McKay* v. *Clackamas County*, No. 604, Oct. Term 1954, page 7.

CONCLUSION

Since the judgment of the Court of Appeals is in conflict with a prior order of this Court, since the principle espoused by the Court of Appeals is contrary to public policy, and since that Court has inappropriately made a significant factual determination at the appellant level, this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

PAUL R. CONNOLLY, ESQ.,
810 Colorado Building,
Washington 5, D. C.

Counsel for Petitioners.

HOGAN & HARTSON,
Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2561-54

MEMORANDUM

All parties agree that there is no genuine issue of material fact and that summary judgment is appropriate.

The plaintiffs contend that earlier legislative attempts to settle the controversy over the fund had failed until the litigation which they instituted on behalf of Clackamas County and that the legislation which subsequently followed and under which the fund was distributed was a direct result of the litigation which they instituted and, therefore, they are entitled to award of a fee from the fund.

The seventeen counties which are named as defendants concede that although they did not employ the plaintiffs as their attorneys nor authorize their employment by Clackamas County, which did employ the plaintiffs, and in fact said seventeen counties disapproved of the litigation conducted by the plaintiffs but felt that relief should be obtained by way of legislation, nevertheless, the plaintiffs would be entitled to award of an attorneys fee out of the fund which has been distributed if in fact it was the result of the litigation. They contend, however, that the plaintiffs' efforts did not compel the disbursement of the fund, and that the moneys were paid pursuant to the direction of an Act of Congress with which the plaintiffs had no connection, but actually opposed.

It is my opinion that the services rendered by the plaintiffs did not produce any benefit to the seventeen counties but that the fund in which they shared was the product of legislation which, in fact, the plaintiffs opposed; that since the litigation which the plaintiffs conducted did not benefit the seventeen counties, they are not liable for attorneys fees on the asserted principle that the plaintiffs created the fund in which the seventeen counties shared.

Accordingly, the plaintiffs' motion for summary judgment will be denied and the motion by the seventeen counties for summary judgment will be granted.

Counsel for defendants will submit an order in accordance with the foregoing.

/s/ JOSEPH C. McGARRAGHY, *Judge*

March 19, 1956.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13353

A. W. LAFFERTY and RICHARD L. MERRICK, APPELLANTS

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, et al., and BENTON COUNTY, Corvallis, Oregon, et al., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided June 13, 1957

Messrs. A. W. Lafferty, Byron N. Scott, and *Donald C. Walker,* of the bar of the Supreme Court of Oregon, *pro hac vice,* by special leave of Court, for appellants.

Mr. Paul R. Connolly for appellee Benton County, Corvallis, Oregon, and certain other appellees. *Mr. Harold S. Harrison,* Attorney, Department of Justice, with whom *Mr. Roger P. Marquis,* Attorney, Department of Justice, was on the brief, for appellee George M. Humphrey, Secretary of the Treasury, and certain other appellees.

Before EDGERTON, Chief Judge, and PRETTYMAN and WILBUR K. MILLER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a suit for a class-action attorney fee. It is another step in a long controversy which began in acts of Congress in 1860-1870. The facts are recited in some detail in our opinion in *Clackamas County, Ore.* v. *McKay.*[1] They need not be repeated here.

In our opinion and decision in that case we held that acts of Congress in 1916[2] and 1937[3] imposed upon the various executive officials involved a mandatory duty to distribute to the Oregon counties the money accumulated in the special fund designated "The Oregon and California land-grant fund". We ordered a remand for proceedings in accordance with that view. That was on April 30, 1954.

A petition for rehearing was filed, and on June 24, 1954, while the petition was pending, Congress passed an act[4] which, *inter alia*, directed that the funds theretofore derived from the lands and placed in the special fund "shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended".

In the presentation to the Congress of the bill which became the act, it was made abundantly clear that the decision of this court had settled the question of the status of the disputed lands but that the court did not attempt to decide the question of jurisdiction for management purposes as between the Department of the Interior and

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[1] 94 U.S. App. D.C. 108, 219 F. 2d 479 (1954).

[2] 39 STAT. 218.

[3] 50 STAT. 874.

[4] 68 STAT. 270, 43 U.S.C.A. § 1181g.

the Department of Agriculture. The distribution of the funds depend upon the former question; if the lands were "O & C" lands the funds belonged in part to the counties, no matter what Department had management of them. The act did not purport to change the court's decision. It effected exactly what the court ordered, distribution of the funds pursuant to the 1937 act, and it decided the dispute as to management, a matter concerning which the court had said nothing.

The legislative history of the 1954 act clearly shows the intention behind it. Senator Cordon, who sponsored the bill, told the Senate:

> "Mr. President, the purpose of the bill is to determine legislatively a jurisdictional question which has existed between the Department of Agriculture and the Department of the Interior for many, many years. . . .
>
> . . . .
>
> "The question of the character and class of the lands reached the courts in 1925, in a suit brought by the Government against the railroad company for an accounting in connection with the revestment and the reciprocal obligation of the Government and the company. In that case the determination of the Court was that the 472,000 acres were revested O. & C. grant lands.
>
> "However, the Court did not attempt to make any determination with respect to the administration of the 472,000 acres in question. That issue was not properly before the Court. There is a series of decisions with respect to the legal status of the lands. The latest decision was rendered only a couple of weeks ago—on April 30, 1954—in the United States Circuit Court of Appeals for the District of Columbia. All decisions have been uniform with respect to the law and its applicability to these lands.
>
> "However, there has remained the question of jurisdiction for management purposes. . . .
>
> . . . .

"Because of the fact that there is a distribution of funds from the O. & C. Railroad lands to local governmental units much greater than the distribution to local units in the case of Forest Service lands, the question of the legal character of the 472,000 acres is of great importance to the people of Oregon. *The courts have determined that question.* • • •

"This bill meets the overall situation by providing that the 472,000 controverted acres are declared to be revested O. & C. lands. This is precisely what the Court declared them to be.

• • • •

"Thus, the bill, S. 2225, takes care of both the administrative question and the jurisdictional one as far as the 472,000 acres are concerned."[5] (Emphasis supplied.)

When the bill reached the floor of the House the following colloquy occurred:

"Mr. WICKERSHAM. Mr. Speaker, reserving the right to object, and I make this reservation at the request of two of our former colleagues, I would like to ask the gentleman from Oregon [Mr. Ellsworth] a question. This measure is a followup and confirms a decision of the District of Columbia Circuit of the United States Court of Appeals on April 30, 1954, in which action A. W. Lafferty, a former Member of Congress, represented Clackamos [*sic*] County, Oreg., and others and won the decision. Is this correct?

"Mr. ELLSWORTH. That is correct.

• • • •

"Mr. WICKERSHAM. Is it a fact that this bill confirms the decision of the court of appeals which directed the payment of $7 million or $8 million to 18 Oregon counties, including Clackamos [*sic*] County, all of which 18 counties thereby benefiting by the action instituted by A. W. Lafferty, as attor-

[5] 100 Cong. Rec. 6886 (1954).

ney, and benefited from the said court decision? This is correct, is it not?

"Mr. ELLSWORTH. That is correct."[6]

On October 21, 1954, the petition for rehearing was denied in this court, and our mandate issued. We noted that as of that time no statement had been made that the Secretaries had distributed the funds.

On February 17, 1955, the Government applied to the Supreme Court for a writ of certiorari, saying that the Secretary of Agriculture had by that time, pursuant to the new act, transferred the funds to the Secretary of the Interior and he in turn had distributed to the counties the parts of the accumulated funds due them, retaining a substantial sum on account of the present proceeding. The Government officials now stand neutral in the matter.

On April 18, 1955, the Supreme Court granted certiorari, vacated our judgment, and remanded the case with directions to dismiss as moot.[7]

Our present appellants, Lafferty and Merrick, are the lawyers who conducted the lawsuit above discussed. They filed an action for attorney fees, naming the Secretaries defendants, as stakeholders of the fund, and the Oregon counties as the debtor defendants. The defendant counties, with the exception of Clackamas County, moved for summary judgment on two grounds: (1) that these lawyers' efforts to bring about a distribution of the fund had been unsuccessful and (2) that the lawyers had not been retained by movants. The District Court granted the motion.

Two questions are before us. The first is whether the lawsuit conducted by these appellant lawyers resulted

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[6] 100 Cong. Rec. 7969 (1954).

[7] 349 U.S. 909, 99 L. Ed. 1244, 75 S. Ct. 599.

in benefit to the counties. To say that it did not result in such a benefit seems to us little more than a play on words. Many efforts had been made prior to 1954 to persuade Congress to settle the controversy specifically and to direct the payment of the funds to the counties. None had succeeded. As the *Congressional Record* shows, when the bill came before Congress in 1954 the members were told specifically and emphatically that this court had settled the legal character of the lands, and in the House they were told that the bill "confirms" the decision of this court. The act finally adopted directed payment pursuant to the 1937 statute, which is what this court had ordered.

If we thought Congress intended to divest a court decree of effectiveness after it had been validly rendered by a court of competent jurisdiction, we would have a serious question as to the validity of the congressional act. But clearly Congress had no such intention. Quite the contrary, it accepted the court decision as settling the controversy as to the nature of the lands and went on from there to prescribe the future management.

To say that the action was unsuccessful because pending certiorari the Government paid over the money which was the sole subject of the litigation, seems to us to be another play on words. A party does not nullify a court order by complying with it.

Thus we are of clear opinion that the lawyers who conducted the litigation performed services which were of value and achieved substantial benefits for the counties.

Upon the second point, that only Clackamas County engaged these lawyers, *Sprague* v. *Ticonic Bank*[8] is dispositive. In the case at bar there was a definite, earmarked fund. The litigation resulted in a substantial

[8] 307 U.S. 161, 83 L. Ed. 1184, 59 S. Ct. 777 (1939).

benefit to all the counties. They all participated in the distribution. The complaint was brought by Clackamas County on behalf of itself and the other counties.

It was said by the Government in its petition for certiorari in the Supreme Court in 1955 that the amendment of the 1937 act contained in the 1954 act resulted in "different payments to the counties under the 1954 Act than under the provisions of the 1937 Act." The amendment may have resulted in different payments to the *respective* counties, but it in no way affected, even by a penny, the total amount payable to all the counties. The lawsuit was to determine whether the whole sum was payable to all the counties. What portion each county would get was not involved. The service rendered by these attorneys was in respect to the whole fund as payable to all of the counties. The formula for distribution among the several counties had nothing to do with their services.

The judgment of the District Court will be reversed and the case remanded for the determination of the proper amounts of fees to be paid these appellant lawyers from the fund retained in the hands of the Government.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 13,353

A. W. LAFFERTY and RICHARD L. MERRICK, *Appellants*,

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, et al., and BENTON COUNTY, Corvallis, Oregon, et al., *Appellees*.

Appeal from the United States District Court
for the District of Columbia

Before EDGERTON, Chief Judge, and PRETTYMAN and WILBUR K. MILLER, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment ———— of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

It is further ORDERED by the Court that appellants herein recover from appellees (except appellees Humphrey, Seaton and Benson) their taxable costs on this appeal and have execution therefor.

Dated: June 13, 1957.

PER CIRCUIT JUDGE PRETTYMAN

APPENDIX B

Act of June 24, 1954, 68 Stat. 270-272

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) those unselected and unpatented odd-numbered sections within the indemnity limits of the Oregon and California Railroad land grant authorized by the Act of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and for which payment was made by the United States to such railroad or its successors in interest under the Act of June 9, 1916 (39 Stat. 218), pursuant to the decree in the case of United States against Oregon and California R. R. Co. (8 F. (2d) 645), which were included within the boundaries of national forests by proclamations of the President of the United States issued under the dates of June 17, 1892, September 28, 1893, October 5, 1906, January 25, 1907, March 1, 1907, and March 2, 1907, are hereby declared to be revested Oregon and California railroad grant lands; and said lands shall continue to be administered as national-forest lands by the Secretary of Agriculture subject to all laws, rules, and regulations applicable to the national forests: *Provided,* That all revenues hereafter derived from said lands and those revenues heretofore derived from such lands and placed in special deposit by agreement between the Secretary of Agriculture and the Secretary of the Interior shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended, and said lands shall not hereafter be subject to the provisions of any other laws or parts of laws which otherwise prescribe the disposal or distribution of receipts from lands of the United States, except that none of the provisions of this Act shall affect revenues heretofore distributed. No part of said lands or the resources thereof shall be subject to exchange under the provisions of this or any other law applicable to national-forest lands or otherwise.

(b) Subsection (a) of title II of the Act approved August 28, 1937 (50 Stat. 874), is amended by adding at the end thereof the following proviso: ": *Provided, however*, That for the purposes of this subsection the portion of the said revested Oregon and California railroad grant lands in each of said counties which was not assessed for the year 1915 shall be deemed to have been assessed at the average assessed value of the grant lands in said county".

SEC. 2. The Secretary of the Interior and the Secretary of Agriculture are authorized and directed, within two years after the enactment of this Act, to exchange administrative jurisdiction of revested Oregon and California railroad grant lands lying within the boundaries of any national forest or within two miles of such boundaries, and national-forest lands of approximately equal aggregate value, when by such exchange the administration of the lands will be facilitated. Such exchanges shall be made subject to outstanding contracts, permits or other existing rights: *Provided*, That the said national-forest lands, administrative jurisdiction of which is transferred to the Secretary of the Interior, shall be excluded from the national forest and shall become subject to administration under the same provisions of law as the revested lands in exchange for which they were transferred, and the revested lands, administrative jurisdiction of which is transferred to the Secretary of Agriculture, shall become a part of the national forests subject to administration under the laws applicable to national forests: *Provided further*, That subject to the requirement of approximate equal aggregate value for the overall exchange, the revested lands and the national-forest lands, administrative jurisdiction of which is exchanged in any county, shall be approximately equal in area unless otherwise agreed to by the counties concerned. The exchanges provided for herein shall in each case be evidenced by an order signed by the Secretary of the Interior and the Secretary of Agriculture

and such orders shall be transmitted to the Division of the Federal Register for filing and publication.

SEC. 3. For the purpose of consolidating and thereby facilitating administration and accounting the Secretary of Agriculture is authorized to designate in the several counties in which the lands described in section 1 of this Act are situated (such designation to be published in the Federal Register), an area of national-forest land of a value substantially equal to the value of the lands in such county from which all revenues shall be disposed of in accordance with the provisions of title II of the Act of August 28, 1937 (50 Stat. 874), and upon such designation the provisions of that Act shall be applicable to the lands so designated in lieu of the lands described in section 1 of this Act: *Provided, however,* That such designation shall not become effective until approved by the county court of the county in which the lands are located.

SEC. 4. For the purpose of carrying out the provisions of sections 2 and 3 of this Act there are hereby authorized to be appropriated such sums as the Congress may from time to time determine to be necessary.

Act of Aug. 28, 1937, Prior to Amendment

Title II of the Act of August 28, 1937, 50 Stat. 874, 875-876, prior to the amendment contained in the Act of June 24, 1954, 68 Stat. 270-271, read as follows:

TITLE II

That on and after March 1, 1938, all moneys deposited in the Treasury of the United States in the special fund designated the "Oregon and California land-grant fund" shall be distributed annually as follows:

(a) Fifty per centum to the counties in which the lands revested under the Act of June 9, 1916 (39 Stat. 218), are situated, to be payable on or after June 30, 1938, and each year thereafter to each of said counties in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value of all of said lands in the State of Oregon for said year, such moneys to be used as other county funds.

(b) Twenty-five per centum to said counties as money in lieu of taxes accrued or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior, until such tax indebtedness as shall have accrued prior to March 1, 1938, is extinguished.

From and after payment of the above accrued taxes said 25 per centum shall be accredited annually to the general fund of the Treasury of the United States until all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: *Provided*, That if for any year after the extinguishment of the tax indebtedness accruing to the counties prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this title is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to

make up the deficiency. When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said 25 per centum shall be paid annually, on or after June 30, to the several counties in the manner provided in subsection (a) hereof.

(c) Twenty-five per centum to be available for the administration of this Act, in such annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of United States: *Provided*, That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land-grant fund mentioned in subsection (b) so long as any such charges shall exist.

All acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act.

Approved, August 28, 1937.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11844

CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon, APPELLANT

v.

DOUGLAS McKAY, Secretary of the Interior, and EZRA TAFT BENSON, Secretary of Agriculture, APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided April 30, 1954

Messrs. A. W. Lafferty and *Richard L. Merrick* for appellant.

Mr. Harold S. Harrison, Attorney, Department of Justice, with whom *Mr. Roger P. Marquis*, Attorney, Department of Justice, was on the brief, for appellees. *Mr. Leo A. Rover*, United States Attorney, *Mr. Lewis A. Carroll*, Assistant United States Attorney, and *Mr. William J. Peck*, Assistant United States Attorney at the time the brief was filed, entered appearances for appellees.

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a civil action brought in the United States District Court for the District of Columbia by Clackamas County, Oregon, on

behalf of itself and seventeen other so-called land grant counties in that State, seeking a *mandamus* directed to the Secretary of the Interior and an injunction to the Secretary of Agriculture.

The controversy concerns the proceeds from the sale of timber from 472,000 acres of public land. This is part of a large tract which has been the subject matter of several acts of Congress and has also been involved in other litigation. There is now on deposit in the Treasury of the United States some $5,000,000 in cash from the sales of the timber on these 472,000 acres. Our appellant, Clackamas County, contends that these moneys should be distributed to it and the other seventeen counties under a specific mandate of the Congress, that the Secretary of the Interior fails and refuses to make such distribution, and that the Secretary of Agriculture is a party to an interdepartmental agreement with the Secretary of the Interior that these proceeds should be withheld from distribution. The Secretaries say (1) that this is a suit against the United States, to which it has not consented, and (2) that the actions sought to be compelled involve discretionary matters which may not be controlled by mandatory injunction. The controversy has a long history.

Because this opinion will be lengthy, we have indicated its subdivisions by the use of numbers as follows: (I) the land grant acts of Congress, the Joint Resolution of 1908, and the Supreme Court decision in 1915; (II) the 1916 Act of Congress; (III) the lawsuit in the District Court of the United States for the District of Oregon, *United States* v. *Oregon & C. R. R.*; (IV) the 1926 and 1937 Acts of Congress; (V) the present controversy and the questions presented; (VI) the doctrine of sovereign immunity and the rule as to judicial compulsion of ministerial duties of administrative officials; (VII) the opinion of the Supreme Court in *Larson* v. *Domestic & Foreign Corp.*;

(VIII) a further discussion of sovereign immunity; (IX) authorities cited by the appellee Secretaries; (X) whether the actions of the Secretaries were discretionary; (XI) the views of our dissenting judge; (XII) conclusion as to the Secretary of the Interior; (XIII) conclusion as to the Secretary of Agriculture; and (XIV) directions to the District Court.

I

In 1866 Congress made to the California and Oregon Railroad Company a grant of public lands, consisting of every odd-numbered alternate section to the amount of twenty alternate sections per mile (ten on each side) of the railroad line.[1] The Act provided that, when any of these sections should be found to have been occupied or otherwise disposed of, other lands should be selected by the railroad in lieu thereof. These other lands, which came to be known as "lieu lands" or "indemnity lands", were to be in odd-numbered sections not more than ten miles beyond the limits of the primary grant.

In 1869 Congress amended the granting act so as to provide, among other things, that the lands granted should be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding $2.50 per acre.[2] The railroad proceeded to violate this latter proviso, making sales of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5.00 to $40.00 an acre and, in one instance, a sale of 45,000 acres at $7.00 an acre to a single purchaser.[3]

The matter came to the attention of Congress, and in 1908 a Joint Resolution was adopted directing the

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[1] 14 STAT. 239.

[2] 16 STAT. 47.

[3] Oregon & C. R.R. v. United States, *infra* note 5.

Attorney General to institute court proceedings to protect the rights of the United States, including a claim that the lands granted to the railroad had been forfeited to the United States by reason of violations of the terms of the granting acts.[4] The suit was brought and reached the United States Supreme Court.[5] The Court held against forfeiture but held that the railroads should be enjoined from any disposition of the lands until Congress should have an opportunity to provide for their disposition "and at the same time secure to the defendants [the railroads and their assignees] all the value the granting acts conferred upon the railroads."[6]

II

Pursuant to that opinion of the Court the Congress in 1916 passed an act,[7] which referred to the foregoing circumstances in a series of "Whereases" and provided that the title to so much of the lands granted to the railroad as had not been sold prior to July 1, 1913, was thereby revested in the United States. The Congress then proceeded, in the Act, to direct what should be done with the land thus revested. It provided that the Secretary of the Interior, "in cooperation with the Secretary of Agriculture, or otherwise," should classify "said lands" into (1) power-site lands, (2) timber lands, and (3) agricultural lands; that the Secretary should sell the timber on the timber lands for cash; and that the non-mineral agricultural lands should be subject to entry and sale under the homestead laws. The Congress then dealt with the problem of compensating the railroad, which it was

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[4] Pub. Res. 18, 60th Cong., 1st Sess., 35 STAT. 571.

[5] Oregon & C. R.R. v. United States, 238 U.S. 393, 59 L. Ed. 1360, 35 S. Ct. 908 (1915).

[6] *Id.*, 238 U.S. at 439, 59 L. Ed. at 1397.

[7] 39 STAT. 218.

required to do by the Supreme Court ruling. The Act authorized and directed the Attorney General to institute a suit against the railroad "to have determined" the amount of moneys which had been received by the railroad on account of any of "said granted lands" and which should be charged against the railroad as part of the "full value" secured under the granting acts as interpreted by the Supreme Court. The Act repeatedly used the word "determination" in describing the contemplated action by the court. The Congress then dealt with the disposition of the money which it anticipated would be derived from the revested lands. The Act provided that all moneys received on account of "said lands and timber" should be deposited in the Treasury of the United States in a special fund to be designated "The Oregon and California land-grant fund",[8] "which fund shall be disposed of in the following manner: * * *." Then followed a formula for the computation of the parts to be distributed. It provided for the payment from the fund of the amounts due the railroad and certain lienholders and for certain accumulated taxes. It then provided for the payment of the annual balances of the fund, in stated percentages, to the state treasurers of the states in which the lands were located, to the treasurers of the counties in which the lands were situated, and to the reclamation fund of the United States, the remainder to become part of the general fund in the Treasury of the United States. The statute provided: "The payments herein authorized shall be made to the treasurers of the States and counties, respectively, by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the close of each fiscal year during which the moneys were received: * * *."[9]

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[8] *Id.* at 222.

[9] *Id.* at 223.

The philosophy and purpose of the statute are plain upon a reading of the congressional debate which preceded its enactment. The original land grant statutes were designed to promote the development of the West and, in this case, of the Oregon territory. The building of the railroad was conducive to the migration of people and goods. The railroads through sale of the land were supplied with funds, and the condition that the land be sold to settlers in small parcels and at a cheap price was to serve the cause of extensive settlement. The action of the railroad in selling the land to large purchasers, chiefly to lumber interests, frustrated this design. According to the Representatives in Congress from Oregon, the people in that State were bitter in blaming the Federal Government for inaction in this situation for over fifty years. Moreover, the proposed revesting of title in the United States would remove from the tax rolls of the State these huge tracts of land, theretofore taxable, and in this transition the schools and roads of the State would suffer. Congress recognized the justice of these claims, and it was for this purpose that it directed a division of the proceeds from the lands among the states, the counties, and the Federal Government. The debate was long and vigorous, every section of the bill being discussed. The Oregon Representatives proposed an amendment which would have given Oregon 80 per cent of the proceeds from the land instead of the 50 per cent which the bill provided; but that amendment was rejected on a roll-call vote. The debate in the House appears in Volume 53 of the *Congressional Record* at pages 8579-8619 and 8648-49.

III

The lawsuit authorized by the 1916 statute was brought by the United States as plaintiff against the Oregon and California Railroad Company in the District Court of the United States for the District of Oregon. It was

a suit for an accounting. The theory of the Act, as the court described it, was "that the railroad company should account to the government for these moneys received by it to which it was not entitled, while the government at the same time obligated itself to pay to the railroad company the full value, namely, $2.50 per acre, for every acre of land to which it was entitled under the grants."[10] The court said: "Such being the thought and purpose, it becomes a matter of inquiry for ascertaining the exact acreage to which the railroad company was and is entitled as of right under its grants, and thereby determining the aggregate of the 'full value,' as declared by the Supreme Court."[11] Many of the facts were stipulated, as, for example, that within the primary limits of the grants were 4,218,902.69 acres. But there were many disputes, some of which were whether certain specified parcels of land were or were not within the grants. To accomplish its task and to decide the ultimate issue of amount, it was necessary that the court, as it announced, to determine these disputed issues. The court rendered a long opinion, making detailed findings upon the various items in dispute. It considered various disputes concerning land included in the primary grants. It then advanced to a consideration of certain controverted areas lying within the indemnity limits of the grant. There were twelve such items. The 472,000 acres with which we are here concerned constituted Item 13(k). That item was described by the court as follows:

> "(k) 472,000 acres, the mineral or nonmineral character of which had not been determined, were included within the limits of national forests by proclamation of the President of the United States. Of this area 190,000 acres were withdrawn for forest

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[10] United States v. Oregon & C. R.R., 8 F. 2d 645, 647 (Ore. 1925).

[11] *Ibid.*

purposes prior to June 29, 1900, and the remainder were withdrawn subsequent to that date."[12]

The court first considered the general status of the indemnity lands and recited the well-settled rule that, where a deficiency within granted primary limits is so great that the indemnity lands would not make good the loss, no formal selection of the indemnity land is necessary to fix the right of the grantee to the entire indemnity land. The court then considered the items one by one.

In respect to Item 13(k) the question was whether the railroad company should have credit for these 472,000 acres, *i.e.*, whether the railroad was entitled to $2.50 for each of these acres. If they had been granted to the railroad, had not been sold, and had been revested in the United States, the railroad was entitled to that credit. These acres lay within the indemnity limits of the grant, but they had been included by proclamation of the President within the limits of national forest reserves. If they had been validly granted to the railroad, they were not subject to appropriation by the President for forest reserves; on the other hand, if they were not within the grant, they were valid forest reserves and could not be included within the acreage for which the railroad company was entitled to be paid. That was the issue on Item 13(k). The court decided that these particular lands had been granted to the railroad and were not public lands at the time the Presidential proclamations had been issued. The court said:

> "All these reserves and additions were set apart by the President long subsequent to the time, as shown by the evidence, that a deficiency was found to exist within the indemnity limits to meet the losses sustained to the place limits, and it was therefore inadmissible for the government to reserve or appropriate to its own use any of such lands. The lands, by

[12] *Id.* at 655.

reason of the deficiency, as we have seen in our examination of item 13(i), had previously and necessarily become appropriated to meet the losses sustained to the place grant. They were not at that time a part of the public domain, and were unsusceptible of appropriation by the government."[13]

Judge Wolverton, who was the District Judge in the case, had also been the trial judge in the case which went to the Supreme Court in 1915, and was thus thoroughly familiar with the problem.

The Oregon court gathered its several findings together into a decree. That decree read in pertinent part as follows:

> "(1) That the title to * * * all unpatented lands for which the defendant, Oregon and California Railroad Company, was entitled to receive patents under the grants as amended of July 25, 1866, and May 4, 1870, be quieted and confirmed in the plaintiff; * * *.
>
> "(2) That 3,727,889.94 acres were included within the grants * * * and that the said Oregon and California Railroad Company * * * is entitled to receive $2.50 per acre for said acreage * * *.
>
> "* * *
>
> "(4) That said acreage * * * includes the following described acreage within the indemnity limits of the grants, to-wit:
>
> "* * *
>
> "472,000 acres included within the limits of the National Forest."

The decree was entered in 1925. The decision was not appealed.

The purpose of the foregoing lawsuit was an accounting between the United States and the railroads upon the

[13] *Id.* at 660.

land grants and the revesting. Basic to that accounting was a determination of what lands had been granted to the railroad. The court determined that the 472,000 acres in Item 13(k) had been so granted. Not by the farthest stretch of imagination could that conclusion be said to be *dictum*. It was part of the foundation upon which the accounting was based. The determination that these acres had been granted and, being unsold, were revested placed them squarely within the terms of the 1916 Act. As revested land they were subject to every provision of that Act, including the provisions that the Secretary of the Interior should classify "said lands" and sell the timber on lands of "class two" thereof; that all moneys received on account of "said lands and timber" should be deposited in the special account; and also those provisions concerning the payments to the counties in which "said lands" are situated, and concerning payments from the balance remaining "in said Oregon and California land grant fund".

The Government suggests that the decree of the court contains a proviso which supports its view. That proviso is:

> "• • • and provided further that nothing in this decree shall be construed to mean that the 472,000 acres of National Forest lands and the 645.95 acres of Klamath Lake Irrigation Project lands shall be sold under the provisions of Act of Congress of June 9, 1916, known as the Chamberlain-Ferris Act."

The Chamberlain-Ferris Act (referred to in this opinion as the 1916 Act) provided that revested non-mineral land should be subject to entry.[14] The quoted portion of the Oregon court's decree was obviously a precautionary note by the judge, meaning that he did not intend his finding and decree to subject this land to homestead entry and

[14] Sec. 5, 39 STAT. 220.

sale and thus to void the reservations of the land by the President for national forests; he was not passing on that subject. He certainly did not mean to deny his whole finding and decree, which was that the land was within the grant and was revested.

It may well be, and probably is, true that upon the revesting the proclamations of the President attached to the lands and they became forest reserves so far as their future was concerned. But that fact could not destroy the specific directions of Congress as to what should be done with moneys received from sales of timber on them.

The action in the District Court of Oregon was brought by the United States. Having thus consented, it was a party, and it and all its agents were bound by the court's decision. We think, and hold, that the Secretary of Agriculture and all other Government officers were and are bound to recognize and abide that court's findings.

IV

In 1926 Congress passed an act[15] which required the Secretary of the Interior to pay taxes to the several counties in Washington and Oregon on the revested Oregon and California Railroad Company grant lands, as though these lands had remained privately owned.

In 1937 Congress passed an act[16] which directed the Secretary of the Interior to manage for permanent forest production such of the revested Oregon and California Railroad lands as might be classified as timberlands, and to sell, cut and remove the timber therefrom in accordance with the "principal" of sustained yield. The act authorized the Secretary to restore to homestead entry such of the revested lands as were more suitable for

[15] 44 STAT. 915.

[16] 50 STAT. 874.

agricultural lands, and to lease for grazing such of the revested lands as he might determine in his discretion. It provided that all the moneys received on account of grazing should be put in the "Oregon and California land-grant fund" in the Treasury.

Title II of this Act of 1937 read as follows (emphasis added):

> "That on and after March 1, 1938, all moneys deposited in the Treasury of the United States in the special fund designated the 'Oregon and California land-grant fund' *shall be distributed* annually as follows:
>
> "(a) Fifty per centum *to the counties in which the lands revested under the Act of June 9, 1916* (39 Stat. 218), *are situated*, to be payable on or after June 30, 1938, and *each year thereafter* to each of said counties *in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value* of all of said lands in the State of Oregon for said year, such moneys to be used as other county funds.
>
> "(b) Twenty-five per centum to said counties as money in lieu of taxes accrued or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior, until such tax indebtedness as shall have accrued prior to March 1, 1938, is extinguished.
>
> "From and after payment of the above accrued taxes said 25 per centum shall be accredited annually to the general fund in the Treasury of the United States until all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: *Provided*, That if for any year after the extinguishment of the tax indebtedness accruing to the counties

prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this title is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to make up the deficiency. When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said 25 per centum shall be paid annually, on or after June 30, to the several counties in the manner provided in subsection (a) hereof.

"(c) Twenty-five per centum to be available for the administration of this Act, in such annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of the United States: *Provided*, That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land grant fund mentioned in subsection (b) so long as any such charges shall exist.

"All Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act."

The purpose of this statute is made clear by the Reports and the debate in the Senate.[17] The 1916 and 1926 Acts had been subjected to two basic criticisms. One was that they required the timber to be sold as rapidly as possible and the cut-over lands disposed of. The other was that they required the counties to submit claims for the equivalent of the taxes which would have accrued

[17] SEN. REP. No. 1231, 75th Cong., 1st Sess. (1937); H.R. REP. No. 1119, 75th Cong., 1st Sess. (1937); 81 CONG. REC. 9325-26 (1937).

upon the revested lands, and these taxes were more than the proceeds from the sale of timber and land, creating a deficit due from the federal Treasury. The new Act provided for the management of the timber on a conservation basis and for the payment to the counties of the net proceeds from the sales each year. The intention that these net proceeds be paid to the counties was unmistakable in the Reports and the debate.

The terms and directives of the statutes of 1916 and 1937 were simple and plain. In the first place they dealt with the lands revested by the 1916 Act; they are prescriptions of what should be done with the money derived from land which had first been granted to a railroad and then taken from it. They conferred upon the Secretary of the Interior many duties requiring the exercise of his discretion and judgment. Those duties relate to classification of land, sale of timber, leases for grazing, homestead entries, etc. Then they contain certain mandatory directives to the Secretary, which do not involve any exercise of discretion or judgment on his part. Once he has made the many judgments required and has moneys in his hands arising from transactions respecting the revested lands—sales of land, sales of timber, grazing rentals—he must put those moneys in a special account in the Treasury, the name of which account is specified by the statute; and, when the end of each year arrives and a balance appears in that account, he must distribute that balance to the entities named in the statute in the proportions named in the statute. The Secretary has no discretion whatever in two duties—to deposit the receipts and to disburse the balances left at the end of each year. The statutes make this indisputably clear. That in other respects and for other purposes, *e.g.*, withdrawal from homestead entry or for public purposes, this land may have been reserved by Presidential proclamations, is immaterial. Congress has specifically authorized the sale of the timber from this land,

and such sales have in fact been made and the money is in fact in hand. Congress was specific as to what should be done with such money.

V

For years, however, the mandates of the 1916 and 1937 statutes have not been followed. On the contrary, the moneys received on account of these revested Oregon and California Railroad lands have not been put in an account bearing the name specified by the statute, but have been put in another special account bearing another name. The United States has not confirmed to the decisions of the Oregon District Court in the action which the United States itself brought for the purpose of determining what it owed the railroads, which involved what were and what were not granted, and thus revested, lands. Disbursements have not been made to the named entities from the moneys received from the revested lands; the Secretary of the Interior has authorized no such disbursements.

The case presents two questions: *One.* Should the Secretary of Agriculture be ordered by the courts to desist from obstructing compliance by other officials of the United States with the findings and decisions of the Oregon District Court in *United States* v. *Oregon & C. R.R.*[18] *Two.* Should the Secretary of the Interior be directed and required by the courts to comply with the mandatory directives of the 1937 statute and to perform the ministerial duties imposed upon him by that act of the Congress, that is, to deposit the moneys derived from the revested lands of the Oregon and California Railroad in the special account named by the statute and to authorize the Treasurer of the United States to pay to the statutory distributees their statutory proportions of what-

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[18] 8 F. 2d 645 (1925).

ever balances remain in that account? The answers to both questions are affirmative.

VI

The principal contention of the Secretaries is that this is an action against the sovereign United States, which has not consented to be sued, and that therefore the action will not lie.

Possible philosophical justification for a doctrine of sovereign immunity in our concept of government is a tempting topic for inquiry.[19] Neither of the two bases—Divine Right or the absolute and irrevocable transfer of power by the people—upon which the doctrine of sovereign power was built[20] exists in our theory of government. And the notion that Government officials can be too busy to respond to a citizen's assertion of rights is the precise antithesis of our proud postulate of government by law. And the amiable recitation that when an officer does right he acts officially but when he does wrong he acts individually is a bit of fiction designed to reconcile the maxim that the King can do no wrong with the plain fact that the King, and every other government, frequently does do very wrong,—a fact which we in this country in no wise attempt to deny.[21] We draw much from the British upon this subject,[22] but there is a basic difference between British sovereignty and our sover-

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[19] See Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Weston, *Actions Against the Property of Sovereigns*, 32 HARV. L. REV. 266 (1919).

[20] 4 HOLDSWORTH, HISTORY OF ENGLISH LAW 192-195 (2d ed. 1937); 6 *id.* 296-299.

[21] See *e.g.*, Federal Tort Claims Act.

[22] Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

eignty. In Britain the government—the Crown and Parliament—is the sovereign.[23] In our system the people are the initial and also the residual sovereign; governments are their servants. The sovereign powers of our legislatures and executive officials are delegated by the people and are limited by the scope of the delegations. After some variations[24] the Supreme Court has in recent years declined to gel the basic theory of sovereignty in our system.[25]

Regardless of the foregoing, however, the law upon the problem before us was settled long ago. The rule is usually stated in terms of ministerial duty, as contrasted with the exercise of discretion. It is an acceptable thesis in our concepts of government that a sovereign action by one branch of government within the scope of its delegated power cannot be impeded or compelled by another branch without consent. Damage or compensation is another problem. When an extended examination is made into any considerable number of the many cases which have dealt with the problem in one form or another, it is easy to see that some such thesis is the philosophical touchstone of the rule which is well-nigh universally applied.

Controversy on the subject arose early in this country. It was, as everybody knows, presented and disposed of by the Supreme Court in *Marbury* v. *Madison*.[26] Chief

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[23] Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919).

[24] The Siren, 7 Wall. (74 U.S.) 152, 19 L. Ed. 129 (1869); Kawananakoa v. Polyblank, 205 U.S. 349, 51 L. Ed. 834, 27 S. Ct. 526 (1907).

[25] Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 83 L. Ed. 784, 59 S. Ct. 516 (1939); United States v. Shaw, 309 U.S. 495, 501, 84 L. Ed. 888, 60 S. Ct. 659 (1940).

[26] 1 Cranch (5 U.S.) 137, 2 L. Ed. 60 (1803).

Justice Marshall discussed the problem in its proper size and perspective as one of the fundamental facets of our system of law and government. The opinion is too familiar to require discussion, but two succinct passages are so directly pertinent to our present problem that we quote them:

> "But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.
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> "The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[27]
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> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.
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> "But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully for-

[27] *Id.*, 1 Cranch (5 U.S.) at 166, 2 L. Ed. at 70.

bid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."[28]

Since *Marbury* v. *Madison* the courts have followed its rule, compelling executive Government officials to comply with directives of the Congress where a specific directive imposed a ministerial duty devoid of the exercise of judgment or discretion.[29] Of course *mandamus* has been de-

[28] *Id.*, 1 Cranch (5 U.S.) at 170-171, 2 L. Ed. at 71.

[29] See, *e.g.*, Kendall v. United States, 12 Pet. (37 U.S.) 524, 9 L. Ed. 1181 (1838) (to compel making of credits); Board of Liquidation v. McComb, 92 U.S. 531, 23 L. Ed 623 (1876) (relating to the use of bonds for liquidation of debt); United States v. Schurz, 102 U.S. 378, 26 L. Ed. 167 (1880) (to compel delivery of a land patent); Butterworth v. United States, 112 U.S. 50, 28 L. Ed. 656, 5 S. Ct. 25 (1884) (to compel issuance of a patent on an invention); Noble v. Union River Logging R.R., 147 U.S. 165, 37 L. Ed. 123, 13 S. Ct. 271 (1893) (to compel executive officials to refrain from revoking approval of right-of-way over public lands); Roberts v. United States *ex rel.* Valentine, 176 U.S. 221, 44 L. Ed. 443, 20 S. Ct. 376 (1900) (to compel payment of interest on certain certificates); Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 53 L. Ed. 168, 29 S. Ct. 62 (1908) (requiring Secretary to reinstate an erased name upon Indian rolls for undistributed share in lands); Ballinger v. United States *ex rel.* Frost, 216 U.S. 240, 54 L. Ed. 464, 30 S. Ct. 338 (1910) (to compel issuance of a land patent); Daniels v. Wagner, 237 U.S. 547, 59 L. Ed. 1102, 35 S. Ct. 740 (1915) (in which the Court described as "too obviously devoid of merit to require anything but statement" the contention that "because a patent of the United States is involved, therefore the United States is a necessary party"); Lane v. Hoglund, 244 U.S. 174, 61 L. Ed. 1066, 37 S. Ct. 558 (1917) (to compel issuance of a land patent); Work v. McAlester, Etc. Co., 262 U.S. 200, 67 L. Ed. 949, 43 S. Ct.

nied more often than it has been granted, but opinions in cases in which the writ was refused throw much light upon the problems.[30] With unremitting regularity the Supreme Court has stated the negative of the rule: *Mandamus* will not issue to control the judgment of an executive officer.[31] But these insistent repetitions emphasize the affirmative converse.

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580 (1923) (to compel approval of a land patent); Work v. Lynn, 266 U.S. 161, 69 L. Ed. 223, 45 S. Ct. 39 (1924) (to compel payment of a fixed sum monthly to an Indian); Wilbur v. Krushnic, 280 U.S. 306, 74 L. Ed. 445, 50 S. Ct. 103 (1930) (directing disposal of a mining claim).

[30] See, *e.g.*, Wilbur v. United States, 281 U.S. 206, 74 L. Ed. 809, 50 S. Ct. 320 (1930) (to compel restoration to rolls of Indians in which the construction of a statute was so uncertain as to require legal judgment); United States *ex rel.* Hall v. Payne, 254 U.S. 343, 65 L. Ed. 295, 41 S. Ct. 131 (1920) (involving construction of a statute, which required judgment and discretion); United States v. Lamont, 155 U.S. 303, 39 L. Ed. 160, 15 S. Ct. 97 (1894) (to compel signing of a contract); United States v. Windom, 137 U.S. 636, 34 L. Ed. 811, 11 S. Ct. 197 (1891) (to compel delivery of a Treasury draft); United States v. Black, 128 U.S. 40, 32 L. Ed. 354, 9 S. Ct. 12 (1888) (relating to a pension); United States v. Lamar, 116 U.S. 423, 29 L. Ed. 677, 6 S. Ct. 424 (1886) (to compel a survey); United States v. Guthrie, 17 How. (58 U.S.) 284, 15 L. Ed. 102 (1855) (involving payment of a disputed salary); Decatur v. Paulding, 14 Pet. (39 U.S.) 497, 10 L. Ed. 559 (1840) (concerning allowance of a pension). And also see West Coast Exploration Co. v. McKay, U.S. App. D.C., Jan. 26, 1954.

[31] See Reeside v. Walker, 11 How. (52 U.S.) 272, 13 L. Ed. 693 (1850); United States v. Seaman, 17 How. (58 U.S.) 225, 15 L. Ed. 226 (1855); Holloway v. Whiteley, 4 Wall. (71 U.S.) 522, 18 L. Ed. 335 (1867); United States *ex rel.* McConnell v. Edmunds, 5 Wall. (72 U.S.) 563, 18 L. Ed. 692 (1867); United States *ex rel.* Ness v. Fisher, 223 U.S. 683, 56 L. Ed. 610, 32 S. Ct. 356 (1912); United States *ex rel.* Alaska Smokeless C. Co. v. Lane, 250 U.S. 549, 63 L. Ed. 1135, 40 S. Ct. 33 (1919).

Two recent cases in this court are *Higginson* v. *Schoeneman*[32] and *American Dredging Co.* v. *Cochrane*,[33] in one of which the grant of *mandamus* was approved; in the other the denial of the writ was approved. Both cases rested upon precisely the same rule. In one it was concluded that the act of the administrative official involved his judgment or discretion, and in the other it was concluded that his action was purely ministerial.[34]

Within the last twenty years the highest courts of thirty-two states have sustained the issuance of *mandamus* to compel ministerial action by administrative officials in government.[35] Within that same recent period

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[32] 89 U.S. App. D.C. 126, 190 F. 2d 32 (1951).

[33] 89 U.S. App. D.C. 88, 190 F. 2d 109 (1951).

[34] See also the extended discussions by Judge Vinson in United States v. Ickes, 69 App. D.C. 324, 101 F. 2d 248 (1938), and Judge Stephens in United States v. Ickes, 68 App. D.C. 399, 98 F. 2d 271 (1938), *cert. denied*, 305 U.S. 619, 83 L. Ed. 395, 59 S. Ct. 80 (1938).

[35] State v. Stone, 232 Ala. 16, 166 So. 602 (1936); Alberts v. McGirk, 51 Ariz. 510, 78 P. 2d 483 (1938); Golden v. McCarroll, 196 Ark. 443, 118 S.W. 2d 252 (1938); Palmer v. Fox, 258 P. 2d 30 (Cal. 1953); People v. Board of Trustees of Firemen's Pension Fund, 103 Colo. 1, 82 P. 2d 765 (1938); State v. Thomson, 131 Conn. 82, 37 A. 2d 689 (1944); City of Macon v. Herrington, 198 Ga. 576, 32 S.E. 2d 517 (1944); Murtaugh Highway Dist. v. Merritt, 59 Idaho 603, 85 P. 2d 685 (1938); People v. Trustees of S. of Township No. 1 South, Etc., 319 Ill. App. 370, 49 N.E. 2d 666 (1943); State v. Bender, 102 Ind. App. 185, 1 N.E. 2d 62 (1936); Independent School Dist. of Danbury v. Christiansen, 242 Iowa 963, 49 N.W. 2d 263 (1951); State v. Board of Comm'rs of Kearny County, 146 Kan. 461, 72 P. 2d 67 (1937); McFarland v. Withers, 274 Ky. 65, 118 S.W. 2d 156 (1938); State v. Board of Trustees, Teachers' Retirement, Etc., 29 So. 2d 489 (La. 1947); Board of Sup'rs of Elections v. County Comm'rs, 88 A. 2d 462 (Md. 1952); National Bank of Detroit v. State Land Office Board, 300 Mich. 240, 1 N.W. 2d 525 (1942); State v. Welsch, 235 Mo. App. 15, 124 S.W. 2d 636 (1939); State v. Geurkink, 111 Mont. 417, 109 P. 2d 1094 (1941); Smith v. Nebraska Liquor Control

many other state supreme courts have discussed and affirmed the rule.

It is suggested to us that, whenever property or money of the United States is involved in a lawsuit, the United States is a necessary party. Of course it is a general rule of law that, when a plaintiff directly attacks the title to a piece of property, the owner is an indispensable party. That rule applies whether the owner is the United States or a private person. There are many cases, *e.g.* condemnation, trespass to try title, bill to quiet title, to foreclose, etc., applying that rule to property owned by the United States.[36] Of the same nature are suits in which complainants seek to compel a transfer of title by the owner of property; the owner, whether the United States or not, is an indispensable party.[37] And there are

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Comm'n, 152 Neb. 676, 42 N.W. 2d 297 (1950); State v. Eighth Judicial District Court, 64 Nev. 256, 180 P. 2d 590 (1947); Garrou v. Teaneck Tryon Co., 11 N.J. 294, 94 A. 2d 332 (1953); City of New York v. Schoeck, 294 N.Y. 559, 63 N.E. 2d 104 (1945); Hamlet Hospital and Training Sch. v. Joint Committee, 234 N.C. 673, 68 S.E. 2d 862 (1952); Board of County Comm'rs of Osage County v. Prentice, 183 Okla. 542, 83 P. 2d 557 (1938); Seufert v. Stadelman, 178 Ore. 646, 167 P. 2d 936 (1946); Hotel Casey Co. v. Ross, 343 Pa. 573, 23 A. 2d 737 (1942); Greenwood Volunteer Fire Co. v. Dearden, 64 R.I. 368, 12 A. 2d 408 (1940); Easler v. Maybank, 191 S.C. 511, 5 S.E. 2d 288 (1939); State v. Clark, 173 Tenn. 81, 114 S.W. 2d 800 (1938); Coleman v. Bench, 96 Utah 143, 84 P. 2d 412 (1938); Gaffney v. Commissioners of Jail Delivery, 112 Vt. 438, 27 A. 2d 114 (1942); State v. Raleigh County Court, 76 S.E. 2d 579 (W. Va. 1953).

[36] Minnesota v. United States, 305 U.S. 382, 83 L. Ed. 235, 59 S. Ct. 292 (1939); Louisiana v. Garfield, 211 U.S. 70, 53 L. Ed. 92, 29 S. Ct. 31 (1908); The Siren, 7 Wall. (74 U.S.) 152, 19 L. Ed. 129 (1869).

[37] Young v. Anderson, 81 U.S. App. D.C. 379, 160 F. 2d 225 (1947), *cert. denied*, 331 U.S. 824, 91 L. Ed. 1840, 67 S. Ct. 1316 (1947); Seiden v. Larson, 88 U.S. App. D.C. 258, 188 F. 2d 661 (1951), *cert. denied*, 341 U.S. 950, 95 L. Ed. 1373, 71 S. Ct. 1017 (1951).

cases involving sales of Government property, where Congress has authorized an executive official to dispose of the property and a plaintiff has sought to control or restrain that official's action. Authority to sell includes discretion and judgment as to terms, conditions, time, etc.[38] Such are *United States* ex rel. *Goldberg* v. *Daniels*[39] and *Larson* v. *Domestic & Foreign Corp.*[40]

VII

Some confusion has arisen because of the idea that the opinion of the Supreme Court in *Larson* v. *Domestic & Foreign Corp.* was a complete summation of all the rules relating to the issuance of *mandamus* against public officials. But the opinion did not purport to deal with an order sought to compel ministerial action. The problem in *Larson* was a threatened alleged illegal action. An executive official had been authorized by the Congress to dispose of certain Government property. The Court described the two familiar types of cases in which threatened illegal action can be enjoined, (1) action outside the official's authority and (2) action under an unconstitutional delegation of authority. Then the Court carefully explained the rule that, even though a Government agent threatens to commit a tort while acting within the scope of his delegated power, the tort cannot be enjoined without consent of the sovereign principal, since it is also the act of the sovereign. The confusion arises principally because of a footnote to the opinion[41] which reads as follows:

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[38] See American Dredging Co. v. Cochrane, *supra*, and, as to contracts to purchase, International Trading Corporation v. Edison, 71 App. D.C. 210, 109 F. 2d 825 (1939), *cert. denied*, 310 U.S. 752, 84 L. Ed. 1417, 60 S. Ct. 1099 (1940).

[39] 231 U.S. 218, 58 L. Ed. 191, 34 S. Ct. 84 (1913).

[40] 337 U.S. 682, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949).

[41] *Supra*, 337 U.S. at 691, n. 11.

"Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina* v. *Temple*, 134 U.S. 22 (1890)."

If is suggested that this footnote means that a suit will fail if the relief requested would involve the disposition of Government property. But the footnote does not make that statement. Rather its meaning is that a suit must fail if it would require the sovereign to dispose of its property—sovereign action, in other words. That meaning is borne out by the one citation made. The one case cited was *North Carolina* v. *Temple*,[42] and the Supreme Court, in the course of that opinion, said of the case: "In other words, it is a suit, in the nature of a bill for a specific performance of a contract, brought to compel the State of North Carolina to raise a tax for the payment of the arrears of interest due on the state bonds held by the plaintiff and others." The State and the State Auditor were named parties defendant. Holding in two brief sentences that that suit was "virtually" against the State itself, the Court cited four cases. We examine them. *Louisiana* v. *Jumel*[43] was a suit which sought to compel officials of the State of Louisiana to carry out general duties as executive officials of the State. "The remedy sought," said the Court, "in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law • • •."[44] *Cunningham* v. *Macon, Etc.*

[42] 134 U.S. 22, 33 L. Ed. 849, 10 S. Ct. 509 (1890).

[43] 107 U.S. 711, 27 L. Ed. 448, 2 S. Ct. 128 (1883).

[44] *Id.*, 107 U.S. at 727, 27 L. Ed. at 454.

R.R. Co.[45] contained an elaborate discussion of the principles upon which a state is held not to be an indispensable party (although some interest of the state may be more or less involved), dividing the cases into three classes. The third class consisted of those cases in which the duty to be performed was merely ministerial and could be compelled by *mandamus*. The Court cited with approval *Marbury* v. *Madison* and other similar cases. *Hagood* v. *Southern*[46] involved several suits which, the Supreme Court said, "are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it."[47] The Court observed: "If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be."[48] Ex Parte *Ayers*[49] was a petition for a writ of *habeas corpus*. The petitioners had been sentenced for contempt for violation of an order of a court. The question was whether the court had power to issue the order which had been violated. That issue depended upon whether the suit was against the state. After an elaborate discussion the Court pointed out that "The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use."[50] Thus neither *North Carolina* v. *Temple* nor any of the cases cited in it stated or held that a suit would fail merely because it involved disposition of sovereign property.

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[45] 109 U.S. 446, 27 L. Ed. 992, 3 S. Ct. 292 (1883).

[46] 117 U.S. 52, 29 L. Ed. 805, 6 S. Ct. 608 (1886).

[47] *Id.*, 117 U.S. at 67, 29 L. Ed. at 810.

[48] *Id.*, 117 U.S. at 69, 29 L. Ed. at 810.

[49] 123 U.S. 443, 31 L. Ed. 216, 8 S. Ct. 164 (1887).

[50] *Id.*, 123 U.S. at 497, 31 L. Ed. at 227.

In *American Dredging Co.* v. *Cochrane, supra,* we said that a non-discretionary act required of an official falls within the exception stated in the *Larson* case, *supra,* relating to acts without authority. If *Larson* is to be deemed a complete statement of all the rules relating to court orders addressed to executive officials, the view indicated in *American Dredging* must be correct. Because, if *Larson* is the summation of all the law on the whole subject, and if court orders compelling performance of merely ministerial acts are not within one of the exceptions stated in *Larson,* the Supreme Court must be deemed to have overruled the entire line of cases on that subject, stemming from *Marbury* v. *Madison.* We think it inconceivable that the Court would take such a step without mentioning the rule of those cases or the cases themselves, and particularly that it would take such sweeping action in a footnote to an opinion which did not involve the point.

Differing somewhat from the suggestion we made in the *American Dredging Co.* case, it seems to us now that the Court in the *Larson* case, consistently with its action in other cases dealing with sales, did not regard the rule as to ministerial duty relevant to the problem before it. In the past, although the same Justices who sat in one type of case,—*i.e.*, ministerial duty,—also sat in the other type,—*i.e.*, sales of property,—they apparently did not consider that the rule in one impinged upon the rule in the other. For example, Mr. Justice Holmes, who wrote the opinion in *United States* ex rel. *Goldberg* v. *Daniels, supra,* also sat in *Ballinger* v. *United States* ex rel. *Frost,*[51] *Lane* v. *Hoglund,*[52] and *Work* v. *McAlester, Etc.*

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[51] 216 U.S. 240, 54 L. Ed. 464, 30 S. Ct. 338 (1910).

[52] 244 U.S. 174, 61 L. Ed. 1066, 37 S. Ct. 558 (1917).

Co.,[33] in all three of which the Court unanimously affirmed the issuance of *mandamus* to compel completion of patents to land; and he also wrote the opinion in *Santa Fe Pac. R.R. Co.* v. *Fall*,[34] in which the Court reversed a denial of an injunction sought to prevent cancellation of selections of land for patents.

VIII

The sovereign power over Government property was vested by the people in the Congress.[35] As a matter of fact the property problem in the great Northwest was one of the impelling reasons for a Federal Government.[36] Congress can exercise that power itself, or it can confer on some agency or officer a measure of sovereign authority over certain property, for example, power to sell. If, on the other hand, Congress itself exercises the full of the sovereign power in respect to property, it may and usually does leave mechanical, ministerial or administrative details to an individual official. In such a case the act of Congress is the complete act needed by the sovereign; the subsequent ministerial acts do not involve sovereign power. If Congress itself were to transfer title to a parcel of public land to a named individual, the officer preparing and executing the documents pursuant to congressional direction would not be exercising sovereign power.

IX

Appellee Secretaries cite *Mine Safety Co.* v. *Forrestal*.[37] The Supreme Court, in pointing out the basis upon which

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[33] 262 U.S. 200, 67 L. Ed. 949, 43 S. Ct. 580 (1923).

[34] 259 U.S. 197, 66 L. Ed. 896, 42 S. Ct. 466 (1922).

[35] U. S. Const. Art. IV, § 3.

[36] 1 Curtis, Constitutional History of the United States c. XIV (1889).

[37] 326 U.S. 371, 90 L. Ed. 140, 66 S. Ct. 219 (1945).

it held *mandamus* not available in that case, said: "Certainly the action which the Secretary proposed to take is not a violation of any express command of Congress. Cf. *Rolston* v. *Missouri Fund Comm'rs*, 120 U.S. 390, 411; *Houston* v. *Ormes*, 252 U.S. 469; *Smith* v. *Jackson*, 246 U.S. 388."[58] In *Houston* v. *Ormes* the Court had affirmed a decree which established a lien upon funds in the Treasury. In *Smith* v. *Jackson* it had affirmed a decree which directed payment of a judge's salary without certain deductions. In *Rolston* v. *Missouri Fund Comm'rs* it had affirmed a decree which compelled state officers to assign certain liens on property mortgaged in favor of the state. Each of those three cases involved property or money. In each the Court acted upon the declared rule that *mandamus* will issue to compel performance of a ministerial duty imposed upon an officer by the legislature. Clearly the statement above quoted from the *Mine Safety* case was a reaffirmation of that rule.

Appellee Secretaries cite *Haskins Bros. & Co.* v. *Morgenthau*;[59] but in that case Judge Groner pointed out, "Nor is it a suit for the purpose of requiring an officer to perform a plain ministerial duty, for likewise in such a case a court may compel him to perform the duty."[60] They cite *Stitzel-Weller Distillery* v. *Wickard*,[61] but one of the main points at issue in that case was whether Congress had directed distribution of the moneys to plaintiffs, and this court held that it had not so directed;

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[58] *Id.*, 326 U.S. at 374.

[59] 66 App. D.C. 178, 182, 85 F. 2d 677, 681 (1936), *cert. denied*, 299 U.S. 588, 81 L. Ed. 433, 57 S. Ct. 118 (1936).

[60] *Id.*, at 185, 85 F. 2d at 684.

[61] 73 App. D.C. 220, 118 F. 2d 19 (1941).

thus the implicit crux of the decision was the existence *vel non* of a congressional directive. They cite *Osage Tribe of Indians* v. *Ickes*,[62] but the basis of that suit was the alleged unconstitutionality of a statute which directed the disposition of the funds, and the court held that the United States as statutory trustee of the disputed money was a necessary party. The Secretaries cite *Morrison* v. *Work*,[63] but the Supreme Court there specifically noted that it did not reach the question "whether the duty of the Secretary of the Interior is merely ministerial"[64] *Young* v. *Anderson*,[65] cited by appellee Secretaries, was a suit to set aside a title in the United States, reversing prior sales and condemnations; the ministerial act problem was not remotely involved. Of the same nature was *Seiden* v. *Larson*,[66] also cited by appellees.

We think it clear from the cases that the critical factor in a suit to compel action by an executive officer of the Government is whether the action sought to be compelled is ministerial or involves judgment and discretion. The problem assumes greater and greater importance as the administrative process grows, because more and more executive and administrative officers are dealing more and more with rights of individual citizens.

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[62] 77 U.S. App. D.C. 114, 133 F. 2d 47 (1943) (affirming on the opinion at 45 F. Supp. 179 (D.C.D.C. 1942)), *cert. denied*, 319 U.S. 750, 87 L. Ed. 1704, 63 S. Ct. 1158 (1943).

[63] 266 U.S. 481, 69 L. Ed. 394, 45 S. Ct. 149 (1925).

[64] *Id.*, 266 U.S. at 489-490.

[65] 81 U.S. App. D.C. 379, 160 F. 2d 225 (1947), *cert. denied*, 331 U.S. 824, 91 L. Ed. 1840, 67 S. Ct. 1316 (1947).

[66] 88 U.S. App. D.C. 258, 188 F.2d 681 (1951), *cert. denied*, 341 U.S. 950, 95 L.Ed 1373, 71 S.Ct. 1017 (1951).

X

Appellee Secretaries say that the actions here sought to be compelled by *mandamus* involve discretionary matters. In this part of their argument they apparently concede that if the duty to be performed is ministerial *mandamus* can issue to compel it; for they say that relief can be thus granted only when the duty is minsterial. They described the discretionary matters as being the fact that the land here involved has long been administered by the Secretary of Agriculture as an integral part of the national forests. They say that the moneys have never been put in the "Oregon and California land-grant fund" but were put in another fund. Thus they say that the status of the land and the money "is a much mooted question". The difficulty with that contention is that those matters are "much mooted" only within the executive branch of government in disregard of (1) a valid finding and decree of a federal court and (2) a specific act of the Congress. That these 472,000 acres were within the national forests was the precise argument made to the District Court of Oregon in an effort to persuade that court that these were not Oregon and California railroad lands revested in the United States by the 1916 Act of Congress. The moneys now involved are the balances of the funds described in the 1916 Act, derived from the sale of timber described in the same act, on the lands which were the subject of that same 1916 Act. Executive officers cannot under such circumstances create an area of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts.

XI

Our dissenting judge is of the view that Congress did not unmistakably authorize the determination in the civil action in the Oregon District Court of the question of what lands had been granted. He says that the action Congress authorized was to determine the moneys received by the railroad on account of the granted lands. But it seems clear to us that to determine the moneys received by the railroad "on account of any of said granted lands," the court had to determine what the granted lands were. The court so construed its duty, and we think it was correct in doing so. The United States did not appeal from that treatment.

Our dissenting judge places major emphasis upon an extract from Section 10 of the 1916 Act, which dealt with the disposition of the moneys derived from the revested lands. After directing that all these moneys be placed in the Oregon and California land-grant fund, the act provided that that fund "be disposed of in the following manner". Then followed a formula. The Secretary was to "ascertain * * * the exact number" of acres of granted land and multiply that figure by $2.50. From that sum he was to make certain deductions and then, year by year, pay the balance to the railroad and certain lienholders until they had been fully paid their due. Thereafter the section provided that the balances should be paid to the counties, etc. In the first place we note that Congress did not authorize the Secretary to *determine* anything; it directed him to "ascertain". "Ascertain" does not mean decide; it means learn. He was not to ascertain what acres or parcels had been granted but merely the *number of* acres granted. This was apparently a simple arithmetical computation, because a certain number of acres had been granted for each mile of track built. The complication of determining what parcels and acres had been granted arose when revesting was declared and it

became necessary to determine what moneys the railroad had received on account of the granted lands. That task Congress left to the court in the suit it directed the Attorney General to bring. The number of acres granted was clear enough; what particular land comprised those acres was a different and difficult problem. In the next place it seems to us to be impossible to believe that Congress meant to authorize a suit for the determination of the moneys which had been received by the railroad on account of the granted lands, and then in the same act authorize the Secretary to determine what lands had been granted. Congress very carefully did not do that. Its words were precise, and we think it meant what it said.

XII

As we pointed out in our examination of the statutes involved in the case at bar, Congress gave the Secretary of the Interior authority in certain respects in regard to the lands revested from the Oregon and California Railroad and in respect to the timber on those lands. In the exercise of those duties he was required to use his discretion and judgment. Those actions could not be controlled by the courts. But when those duties were all completed, and at the end of the year a balance remained in the Oregon and California land-grant fund in the Treasury, the Secretary had no discretion as to his action. He was specifically and unequivocally directed by the Congress to cause the distribution of that balance according to the terms of the statute. That function of the Secretary fell within the line of cases beginning with *Marbury* v. *Madison*, which we have cited. The courts can and should require him to comply with the congressional mandate.

XIII

With respect to the other question presented to us, which concerns the Secretary of Agriculture, this court

has held, without equivocation, that Government officials are bound to comply with the valid decisions of the courts.[67] In a valid final decision of a federal court in a suit to which the United States was a party by its own action, the lands here involved were held to be lands of the Oregon and California Railroad Company which were revested by act of Congress and which, as revested lands, came within the statutes we have discussed. The Secretary of Agriculture, like every other Government official, is required to abide by the terms of that court decision.

We conclude that the case at bar is not, within the meaning and principle of the authorities, an action against the United States Government and that the United States is not an indispensable party.

XIV

The judgment of the District Court will be reversed and the case remanded with instructions to enter a decree in accordance with the terms of this opinion. The decree will enjoin the Secretary of Agriculture from interfering with compliance by any other Government official with the terms of the Acts of 1916 and 1937, and specifically from interfering with the distribution by the Secretary of the Interior and the Treasurer of the United States of the moneys which remain as balances in the account in the Treasury which by the terms of the statute was a special account of which the proper title was "The Oregon and California land-grant fund", and from interfering with the treatment of the 472,000 acres of land here involved as land revested from the railroad by the

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[67] Land v. Dollar, 88 U.S. App. D.C. 311, 190 F. 2d 366 (1951); Land v. Dollar, 89 U.S. App. D.C. 38, 190 F. 2d 623 (1951). (The orders in these cases were stayed and eventually dismissed by the Supreme Court.) See also International Union, Etc. v. United States, 85 U.S. App. D.C. 149, 177 F. 2d 29 (1949), *cert. denied*, 338 U.S. 871, 94 L. Ed. 535, 70 S. Ct. 140 (1949).

1916 Act of Congress; and will direct the Secretary of the Interior to issue authorization to the Treasurer of the United States to distribute the balances in the aforesaid account to the entities named in the pertinent statutes and in the proportions therein specified.

Reversed and remanded.

EDGERTON, Circuit Judge, *dissenting.* The court's conclusion rests on the premise, among others, that in the 1916 Act Congress unmistakably authorized the District Court for Oregon to decide whether the 472,000 acres of government land here involved had been granted to the railroad. I think this premise erroneous.

The 1916 Act revested in the United States so much of the granted lands as had not been sold by the railroad. In §7, the Act expressly authorized the Attorney General to "institute and prosecute . . . suits . . . against the Oregon and California Railroad Company . . . to have determined *the amount of moneys which have been received by the said railroad company* . . . on account of . . . granted lands . . . *and which should be charged against it* as a part of the 'full value' secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court." (Emphasis added.) 39 STAT. 221. The Act did not, expressly or by any implication that I can see, authorize a court to determine in such a suit what lands had been granted.

There is some implication to the contrary, for §10 of the Act, which said nothing about a court or a suit or the Attorney General, authorized *the Secretary of the Interior* to ascertain how much land had been granted. 39 STAT. 222.

This court says that "to determine the moneys received by the railroad 'on account of any of said granted lands.' the court had to determine what the granted lands were."

This seems to me both debatable and immaterial. It is immaterial because it applies only to lands which the railroad had sold and which, therefore, were not revested in the United States by the 1916 Act. As the court points out elsewhere in its opinion, we are concerned with lands which the railroad had *not* sold and which *were* revested in the United States by the 1916 Act.

Though the court says the words of Congress "were precise, and we think it meant what it said", the court points to no precise words by which Congress said that the District Court for Oregon might decide what lands were granted. I do not suggest that the question whether Congress meant that is not debatable. But the very fact that it is debatable means that the status of the lands and funds now in suit is not so clear as to make the duties of the Secretaries merely ministerial. I do not reach other questions.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 11844

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

Memorandum

Filed October 21, 1954

Before: EDGERTON, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges.

PER CURIAM: The court has before it a petition for rehearing and several motions.

1. In so far as the petition for rehearing requested rehearing *in banc*, it was denied by the court on June 21, 1954. In the course of their petition for rehearing appellees urged that the court's judgment directed an action which is premature in the present status of the case. In Section XIV of the opinion promulgated April 30, 1954, this court directed the entry of a decree and specified the terms of the decree. This was an inadvertence arising from references in the record and briefs to summary judgment in the District Court. As a matter of fact the District Court granted a motion to dismiss the complaint. The defendant Secretaries had not pleaded, other than to move to dismiss, and a motion for summary judgment was neither made nor considered. Section XIV of the opinion of April 30, 1954, will be stricken and the following inserted in lieu thereof:

XIV

> The judgment of the District Court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Of course, if the allegations of the complaint are substantially established as pleaded, a decree of the District Court not inconsistent with the opinion of this court would contain substantially the matter described in our original Section XIV. The petition for rehearing will be denied.

2. Appellees move that the judgment heretofore entered by this court be vacated, the opinion promulgated April 30, 1954, be withdrawn, and the case be remanded to the District Court as moot because of the enactment on June 24, 1954, of Public Law 426, 68 Stat. 270. The gist of the controversy is that the defendant Secretaries have failed and refused to comply with an Act of Congress of 1916, 39 Stat. 218, known as the Chamberlain-Ferris Act, and a further Act of 1937, 50 Stat. 874, which was based upon and further implemented the Act of 1916. The judgment of this court was that it was and is the duty of the Secretaries to comply

with the 1937 Act, and that they could and should be required to do so. Public Law 426, approved June 24, 1954, provides that the revenues derived from these lands and placed in special deposit "shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended". It is not alleged, and it does not appear, that the amendments to the 1937 Act made by Public Law 426 changed the distribution directed by the 1937 Act. The amendments went principally to the future administration of the revested lands, a matter which was not involved in this litigation or considered in the opinion of this court, as the opinion itself carefully noted. This view is supported by the statement made on behalf of the seventeen Oregon counties to the Senate Committee considering the bill which became Public Law 426.[1] Therefore it appears that, in so far as it is pertinent to the present controversy, Public Law 426 merely directs the Secretaries to comply with the 1937 Act, which is precisely what the court directed them to do. No statement is made that the Secretaries have complied by distributing the funds in accordance with the distribution directed in the 1937 Act. It thus clearly appears that the judgment of the court has not been rendered moot. The motion to dismiss as moot will be denied. Likewise the prayers, contained in the same motion, to vacate the judgment and to withdraw the opinion will be denied.

3. Seventeen counties in Oregon move for leave to intervene for the purpose of filing a motion to dismiss the appeal as moot. The complaint in this case was brought by Clackamas County, Oregon, as one of eighteen counties which, it contended, were entitled to the funds derived from the revested lands. In the complaint the plaintiff said: "Clackamas County brings this suit on its own behalf, and

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[1] Statement of Frank S. Sever, *Hearing before Committee on Interior and Insular Affairs on S. 2225*, 83d Cong., 2d Sess. 38 (1954).

in behalf of any other of the 18 Oregon counties interested who may see fit to come in and become parties, or who may be brought in by order of this Honorable Court under its powers in the premises." The names of the other seventeen counties were listed. So far as the record before us shows, none of the other seventeen counties sought to become a party and none was brought in by order of the court. Nevertheless it is clear that as a practical matter that, if, pursuant to the opinion of this court of April 30, 1954, it should eventuate that the District Court should compel the Secretaries to distribute the funds pursuant to statute, each of the seventeen counties will receive its share and will thus be a beneficiary of the litigation. These counties say that they expect the Secretaries to comply with Public Law 426 and that thus they will receive their distributive share of the funds quite apart from the litigation.

A petition to intervene is addressed to the sound discretion of the court, and particularly is this so where the petition comes so late in the litigation, after judgment has been entered by the appellate court. Under all these circumstances the petition to intervene will be denied. In this connection we call attention to what we have hereinabove said in connection with the motion of the Secretaries to dismiss the litigation as moot.

4. Appellant moves for leave to file the printed hearings which are part of the legislative history of Public Law 426, approved June 24, 1954. This motion will be granted in view of the motions of the seventeen counties and of the appellee Secretaries, which are premised upon Public Law 426.

5. Appellant moves to file a supplemental memorandum in opposition to the Secretaries' motion to vacate the judgment and dismiss as moot. This motion will be granted.

6. Appellant moves for leave to file a telegram, which telegram appears to have been directed from the Commis-

sioners of Clackamas County, Oregon, and its counsel in Oregon to local counsel. It is in the nature of a brief in opposition to the motion of the motion of the appellee Secretaries for amendment of the opinion. The motion will be granted and the telegram of counsel filed as a memorandum in argument upon that motion of the appellee Secretaries.

EDGERTON, *Circuit Judge*, took no part in these rulings.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 11,844

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is.....ordered and adjudged by this Court that the jndgment..... of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be,

and it is hereby, remanded to the said District Court with instructions to enter a decree in accordance with the terms of the opinion of this Court.

Dated: April 30, 1954.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Edgerton.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1954

No. 11,844

CLACKAMAS COUNTY, OREGON, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, APPELLANT

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, APPELLEES

Before: EDGERTON, WILBUR K. MILLER, and PRETTYMAN, Circuit Judges in Chambers.

ORDER

It is ORDERED by the Court that the second paragraph of the judgment entered herein April 30, 1954, be, and it is hereby, amended to read as follows:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with this opinion."

Per Curiam.

Dated: October 21, 1954.

Circuit Judge Edgerton did not participate in the above order.

SUPREME COURT OF THE UNITED STATES

April 18, 1955

No. 604. McKay, Secretary of the Interior, et al. v. Clackamas County, Oregon. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to dismiss the proceeding upon the ground that the cause is moot. Mr. Justice Burton and Mr. Justice Harlan dissent.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 429

BENTON COUNTY, OREGON, ET AL., PETITIONERS

v.

A. W. LAFFERTY, RICHARD L. MERRICK, AND ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT GOVERNMENT OFFICIALS

OPINIONS BELOW

The opinion of the District Court dated March 19, 1956, and the opinion of the Court of Appeals dated June 13, 1957, have not been reported. These opinions appear in the petition at pages 1a–8a. A prior opinion by the Court of Appeals, upon which its opinion in the instant case rests, is reported as *Clackamas County, Ore.* v. *McKay,* 219 F. 2d 479 (C. A. D. C.), reversed and remanded for dismissal as moot, 349 U. S. 909, rehearing denied, 349 U. S. 934.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1957 (Pet. 9a). The petition for a writ of certiorari was filed on September 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The basic question of concern to the Government is whether the award of an attorney's fee, payable from funds derived from the sale of timber from lands owned by the United States, for influencing the passage of legislation regulating the distribution of the funds so derived is so offensive to public policy as to be invalid.

STATEMENT

In the early 1940's, a disagreement arose between the Department of Agriculture and the Department of the Interior with respect to the administration of some 472,000 acres of federally owned lands in Oregon. Contracts for the sale of timber on these lands had been entered into by the Department of Agriculture (Forest Service) and were producing substantial revenue. If the lands were properly subject to administration by the Department of Agriculture, 25% of the timber sale proceeds would go to the eighteen Oregon counties in which the lands were located and 75% would go to the United States. On the other hand, if these lands were to be considered subject to administration by the Department of the Interior as "O & C lands", then 75% of the timber sale proceeds was to go to the counties and 25% to the United States.

With an impasse existing on this basic issue, it was agreed that moneys received from timber sales should be placed in a special deposit account until such time as the issue could be resolved.

In 1952, a suit was instituted by Clackamas County, Oregon, against the Secretary of the Interior and the Secretary of Agriculture to obtain a declaration that the lands were properly subject to administration by the Department of the Interior and, in effect, that 75% of the fund should be paid to the eighteen interested Oregon counties in accordance with the so-called "O & C" formula. The suit was dismissed by the District Court for lack of jurisdiction. The United States Court of Appeals for the District of Columbia Circuit reversed the judgment and remanded the case for further proceedings. While a petition for rehearing was pending in that court, Congress enacted the Act of June 24, 1954, 68 Stat. 270, 43 U. S. C. 1181 (g), Supp. IV, which mooted the issue, *i. e.*, it directed that administration of the lands be left with the Department of Agriculture but that all timber income, including the past amounts collected in the special deposit account, be distributed under the "O & C" formula. The Court of Appeals denied the petition for rehearing. However, this Court granted certiorari, vacated the judgment below, and directed the dismissal of the litigation as moot. *McKay* v. *Clackamas County, Oregon*, 349 U. S. 909, rehearing denied, 349 U. S. 934.

In June, 1954, the instant suit was brought by the attorneys for Clackamas County, respondents herein, to assert that their efforts preserved the fund for

the benefit of the other seventeen Oregon counties, and that they were entitled to a reasonable attorneys' fee payable out of the fund. Since passage of the Act of June 24, 1954, *supra*, the accrued fund of approximately $8,000,000 has been distributed as directed by Congress except that the sum of $800,000 has been retained because of the pendency of this case.[1]

In March, 1956, the District Court issued a memorandum opinion in which it concluded (Pet 1a) that:

> the services rendered by the plaintiffs did not produce any benefit to the seventeen counties but that the fund in which they shared was the product of legislation which, in fact, the plaintiffs opposed; that since the litigation which the plaintiffs conducted did not benefit the seventeen counties, they are not liable for attorneys fees on the asserted principle that the plaintiffs created the fund in which the seventeen counties shared.

Accordingly, the District Court ordered that "judgments be entered in favor of the defendants and each of them against the plaintiffs". The attorney respondents appealed. Expressing the view that they had rendered services "which were of value and

[1] As noted in fn. 3, pp. 10–11, of the petition for certiorari filed in *McKay* v. *Clackamas County, Oregon*, No. 604, October Term, 1954, the Government officials offered to distribute the $800,000 under the 1954 Act if all the Oregon counties involved, and their counsel, would agree that, without prejudice to the merits of their positions in the attorneys' fee dispute, any attorneys' fee which might be awarded in connection with this matter would be payable from the counties' share of future receipts from the lands involved. Such agreement was not forthcoming.

achieved substantial benefits for the counties" (Pet. 7a), the Court of Appeals reversed the judgment of the District Court. The seventeen Oregon counties, petitioners herein, are now seeking certiorari.

DISCUSSION

In the lower courts, the Government officials, who were designated as defendants in this action, took a neutral position on the merits of this dispute. They neither affirmed nor denied that the respondents Lafferty and Merrick were entitled to an attorneys' fee payable out of the fund now in the United States Treasury. Because of certain statements in the opinion of the Court of Appeals and its failure to deal with a problem important to the Government, this memorandum for the respondent Government officials is now being filed.[2]

1. If the Court of Appeals was awarding fees for bringing about the successful passage of the legislation, as some parts of its opinion suggest (see Pet. 4a–6a, 7a), it was adopting a rule which should not be countenanced. As indicated by the authorities cited

[2] It is conceded, as it was in the courts below, that approximately $600,000 of the amount retained in the special deposit account is due and owing to the petitioning Oregon counties and to Clackamas County. A portion of the fund was retained only because of this litigation. In these circumstances, if it is authoritatively found that a valid lien for attorneys' fees exists; that all parties will be bound by the decree; and that it will be "a full acquittance to the United States for any and all claims and demands of the parties arising out of or connnected with said claim" (*Houston* v. *Ormes*, 252 U. S. 469, 472; *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121, 125–127); presumably, the respondent government officials would not be prejudiced by a decree directing the payment. See *infra*, pp. 7–8.

in the petition (Pet. 16), it is established law that a contingent fee contract for influencing or attempting to influence the passage of favorable legislation is void and unenforceable as against public policy. An award of fees for the influencing of legislation would likewise appear to be contrary to the decisions of this Court. *E. g.; Marshall* v. *Baltimore and Ohio Railroad Company*, 16 How. 314, 334–336; *Tool Company* v. *Norris*, 2 Wall. 45, 54–55; *Trist* v. *Child*, 21 Wall. 441, 448–453; *Hazelton* v. *Scheckells*, 202 U. S. 71, 78–79; *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326, 338.

2. The opinion of the Court of Appeals suggests that the United States complied with the order of the Court of Appeals when making payments to the Oregon counties. But as this Court was advised in the petition for certiorari filed on behalf of the Government officials in *McKay* v. *Clackamas County, Ore.*, No. 604, October Term, 1954, pp. 2, 10, 13, 14, the payments to the counties were made under the Act of June 24, 1954, 68 Stat. 270, 43 U. S. C. sec. 1181 (g), Supp. IV. Indeed, there was no court decree which had attained finality, and the decree referred to by the Court of Appeals never did attain finality so as to become an effective court order. The motion for rehearing and the petition for certiorari, which were duly filed, kept the decree of the Court of Appeals from becoming binding upon the Government officials. And, since that judgment was vacated by this Court and the case in which it had been issued was remanded for dismissal as moot (*McKay* v. *Clackamas County, Ore.*,

349 U. S. 909, rehearing denied, 349 U. S. 934), the result was as if the case had never been brought, and no legal consequences could flow from it. *United States* v. *Munsingwear*, 340 U. S. 36, 41.[3] Furthermore, as was spelled out in the petition for certiorari in the *Clackamas County* case, *supra* (No. 604, October Term, 1954, pp. 16–18), there were reasons other than mootness why the judgment of the Court of Appeals in that case should not stand.

3. From the viewpoint of the Government, the opinion of the Court of Appeals is further deficient in the following respect: As this Court made clear in *Houston* v. *Ormes*, 252 U. S. 469, 472, before a mandatory order could be entered directing the named government officials to pay a part of the fund to the respondents Lafferty and Merrick, the United States would have to have a proper acquittance against the counties. In other words, before the relief demanded in the complaint could be granted, it must be found that the court has jurisdiction over the Oregon counties. Absent such a finding, no relief can be granted against the remaining defendants. *Pilger* v. *Sutherland*, 57 F. 2d 604, 607 (C. A. D. C.), quoted with approval in *Morgenthau* v. *Fidelity & Deposit Co. of Maryland*, 94 F. 2d 632, 634 (C. A. D. C.). While the question whether the actions of the seventeen

[3] Since its decree was thus never an effective one, the possible doubt which the Court of Appeals raises as to the validity of the congressional act (Pet. 7a) is unwarranted and was disposed of when this Court rejected the arguments against dismissal as moot. See the petition and briefs filed in No. 604, October Term, 1954.

counties amounted to a voluntary appearance was raised in the Court of Appeals, the opinion is silent on the subject.

Respectfully submitted.

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SEPTEMBER 1957.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 429

BENTON COUNTY, OREGON, ET AL.,
Petitioners

v.

A. W. LAFFERTY, RICHARD L. MERRICK, and ROBERT B. ANDERSON, Secretary of the Treasury, ET AL.,
Respondents

BRIEF OF RESPONDENTS A. W. LAFFERTY AND RICHARD L. MERRICK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The question to be decided is whether the Plaintiffs below, A. W. Lafferty and Richard L. Merrick, are entitled to compensation for their professional services out of a part of the fund, which has been withheld in the Treasury for this purpose, or whether upon the unsubstantial ground that an Act of Congress of June 24, 1954, which followed and implemented the decision of the Court of Appeals of April 30, 1954, intervened, the plaintiff lawyers are to be deprived of all compensation for their arduous labors on behalf of 18 Oregon counties, which resulted in substantial benefits to the counties.

STATEMENT

The facts set forth in the petition are deemed to be insufficient to apprise this Court fully of the situation.

By four Acts passed in 1866, 1868, 1869, and 1870 (14 Stat. 239; 15 Stat. 80; 16 Stat. 47; 16 Stat. 94), Congress granted more than 3,000,000 acres of land in Oregon to the Oregon and California Railroad Company. The granting acts required sales of the lands to actual settlers in tracts not greater than 160 acres and for prices not exceeding $2.50 per acre.

For failure by the railroad to obey those requirements, Congress, by the Act of June 9, 1916 (39 Stat. 318), revested the title to all unsold lands in the United States.

By the Act of August 28, 1937 (50 Stat. 874), the revested lands were directed to be administered by the Department of the Interior "for permanent forest production, and the timber to be sold, cut, and removed in conformity with the principle of sustained yield," 75 per cent of the revenues derived therefrom to be paid to the eighteen Oregon counties in which the lands are located, and 25 per cent to the Department of the Interior for administration purposes.

By Proclamations issued in 1892 and 1893, the President established two forest reserves (now called National Forests), and included therein 472,000 acres located within the boundaries of the grant to the railroad company.

As a result of a jusisdictional controversy between the Departments of Interior and Agriculture, an agreement was reached in 1942 to hold the money derived from timber sales in a Special Account in the Treasury Department until settlement of the jurisdictional dispute.

In 1952, Clackamas County, Oregon, brought an action in the United States District Court for the District of

Columbia on its behalf and on behalf of the other seventeen land grant counties, who are the Petitioners in the case at bar, to release the funds to the counties and to determine the jurisdictional dispute (*Clackamas County* v. *Douglas McKay, et al.**) That action resulted in the opinion of the United States Court of Appeals for the District of Columbia which is printed in Petitioners' Appendix C herein at pages 15a to 48a, and which is referred to herein as the *Clackamas County* case. Respondents Lafferty and Merrick were attorneys for Clackamas County in that litigation.

The object of Respondents Lafferty and Merrick in the case at bar is the recovery of compensation for their successful efforts in the Clackamas County ase, payable from funds held in the Treasury pending the outcome of this litigation (Joint (App. No. 11,844, *Clackamas County* case, page 3A et seq; No. 604, October Term, 1954, in this Court).

The Solicitor General of the United States summarized the controversy in the *Clackamas County* case in his petition for certiorari in No. 604, October Term, 1954, in this Court, as follows:

> The Oregon counties contended . . . that the lands in question should be considered "O & C" lands. In 1939, the Department of the Interior changed its earlier view and adopted the position of the Oregon counties. Hearings H. Committee on Public Lands, H. R. 1688 and S. 275, 78th Congress, 1st and 2d sessions (1943-1944), pp. 227-229. Because of the

* In this Brief in opposition to the petition for certiorari, the case entitled *A. W. Lafferty and Richard L. Merrick* v. *George M. Humphrey, Secretary of the Treasury, et al.; and Benton County, Oregon, et al.*, No. 2561-54 in the District Court; No. 13,353 in the Court of Appeals; and No. 429 in this Court, which is the case at bar, is, for convenience, referred to as the *Lafferty* case. The case of *Clackamas County, Oregon,* v. *McKay, Secretary of the Interior, et al.*, No. 5258-52 in the District Court; No. 11,844 in the Court of Appeals; and No. 604, October Term, 1954, in this Court, is similarly referred to as the *Clackamas County* case.

serious dispute which developed between the Department of Agriculture and the Department of the Interior as to which of the two statutes governed the distribution of the proceeds from timber sales from the lands, the suspense account involved in this litigation was established, Congress being advised of it. *Ibid.*, pp. 247-248, 387.[2] During the course of the controversy the Attorney General considered the matter over a period of many years in connection with some 15 bills introduced on the subject.

REASONS FOR DENYING WRIT

The Petitioners in their petition to this Court for a writ of certiorari give three reasons for the issuance of the writ.

In this brief in opposition to the petition each of these three reasons will be separately discussed.

1. *Alleged Conflict with This Court's Order.*

The first reason assigned by Petitoners for granting the writ of certiorari is:

> (1) The judgment of the Circuit Court of Appeals is in conflict with the order of this Court of April 18, 1955 (349 U.S. 909).

The order of this Court to which Petitioners refer is the Per Curiam order entered April 18, 1955, in the case of *Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, Petitioners* v. *Clackamas County, Oregon*, No. 604, which reads as follows:

---

[2] The full history of the controversy is set out in the legislative history of many bills on the subject. See, e.g., 2 Hearings, S. Committee on Public Lands and Surveys, S. 275, 78th Congress, 1st session (1943), (including reports by the Department of the Interior and Department of Agriculture (*ibid.*, pp. 119-178)); Hearings, H. Committee on Public Lands, H. R. 1688 and S. 275, 78th Congress, 1st and 2nd sessions (1943-1944).

> The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to dismiss the proceeding upon the ground that the cause is moot.

The foregoing order of this Court was entered in response to a Petition for a Writ of Certiorari filed by Solicitor General Sobeloff which concludes with this paragraph:

> 4. Though this Court has made clear that anticipation of future difficulties does not preserve the [illegible] ticiable quality of a case which has been rendered moot (*Commercial Cable Co.* v. *Burleson*, 250 U.S. 360, 362), to allay any apprehension which respondent may have, we suggest that the judgment of the court of appeals should be reversed or vacated and the case remanded for dismissal as moot without prejudice to the rights of the respondent in the future with respect to any actual issue which may possibly develop under the present law [Citing cases]. A grant of certiorari accompanied by a reversal or vacating of the judgment of the Court of Appeals and a remand of the cause to the district court with directions to vacate the order appealed from and to dismiss the proceeding as moot would be an appropriate disposition of the case [Citing cases].

It was unnecessary for this Court, in its order of April 18, 1955, to state that the case was to be dismissed "without prejudice to the rights of the respondent" because such was the well settled legal effect of its order.

In *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950), cited by Petitioners, this Court held that in a case where the judgment was not vacated, the unvacated judgment operated as *res judicata*, but this Court pointed out that in a case where a judgment is *vacated for mootness*, the result is entirely different. This Court said:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate

the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U. S. 259, 267, 57 S. Ct. 202, 205, 81 L. Ed. 178, to be "the duty of the appellate court". That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

In the *Clackamas County* case, No. 604, this Court did not reverse the opinion of the Court of Appeals. It vacated the judgment of the court below on the ground of mootness and, in effect, decided only that the Statute of June 24, 1954, related to substantially the same subject matter considered by the Court of Appeals in its opinion of April 30, 1954, and that, therefore, there was no longer any actual controversy between the parties.

The very purpose of this procedure, as this Court pointed out in its opinion in the *Munsingwear* case is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."

If, under the procedure followed by this Court in the *Clackamas County* case, "the rights of all parties are preserved" and "none is prejudiced" *as between the parties to that litigation*, it must be true, *as between different parties to different litigation over different issues* that no "legal consequences" result from the prior litigation, and that there is no conflict between the litigation in the *Clackamas County* case and this case.

2. *"Public Policy"*

The second reason assigned by Petitioners for granting the writ of certiorari is:

"2. A federal court's award of attorney's fees out of public monies appropriated for a specific purpose, for

influencing the passage of favor legislation raises such grave questions of public policy as to call for review by this Court."

It is the obvious purpose of Petitioners to bring themselves under that portion of Rule 19(1)(b) of the Revised Rules of this Court which provides that one of the reasons for granting review on writ of certiorari which will be considered by the Court is "Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court; . . ."

Respondents submit that there is in this case no question as to the validity or construction of the Constitution or any law of the United States and that there is in the case no question of federal law, but, on the contrary, the question decided by the court of appeals was an ordinary common law question not within the criteria laid down by this Court for granting the writ of certiorari.

Under the caption (page 14 of Petitioners' petition), "The Award Offends Public Policy," Petitioners argue that the recovery of a fee by plaintiffs is so repugnant to public policy that it should be laid down, *as a matter of law*, that they cannot recover any compensation in any amount for the services which they admittedly rendered.

In order to perceive the full import of Petitioners' argument it is essential to keep in mind a few elemental facts in this case:

The *Clackamas County* case was a class action brought by Plaintiffs as attorneys in the name of Clackamas County for the benefit of all similarly circumstanced eighteen Oregon land grant counties. The action resulted in a decision of the United States Court of Appeals for the District of Columbia Circuit, which compelled the distribution to all eighteen counties of 75% of a fund in

the custody of the Secretary of the Treasury. *After* the rendition of this opinion of the Court of Appeals, the Congress enacted into statutory form the substance of the opinion of the Court of Appeals relating to the status of the land and distribution of the impounded funds. The only evidence that plaintiffs took any action whatsoever with reference to this statute is the statement in an affidavit filed by Lafferty, one of the Plaintiffs, that among other services rendered by him, he appeared before a committee of Congress. (See statement on page 16 of Petitioners' petition.) The Federal Regulation of Lobbying Act (2 U.S.C. Nos. 261-270), which regulates lobbying, expressly exempts appearances before committees of Congress from the operation of the Act. Section 267(a) states that the Act does "not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation."

In *Trist* v. *Child*, 21 Wall. 441, cited by Petitioners, a contract which contemplated certain lobbying activity, which this Court deemed improper, was held to be invalid. But this Court was careful to point out that an agreement for purely professional services would have been valid. The Court said:

> We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included: drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, *to a committee or other proper authority, and other services of like character.* (Emphasis supplied)

Thus does the Supreme Court draw a clear line between contracts for services which are valid and those which are void, *Valdes* v. *Larrinaga*, 233 U. S. 705, 34 S. Ct. 750.

The Petitioners also cite *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314. In *Marshall*, the Court was careful to make a distinction between improper actions such as it condemned and proper professional activity in connection with proposed legislation. The court said:

> All persons whose interests may in any way be affected by any public or private act of the Legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, *before legislative committees, as well as in courts of justice.* (Emphasis supplied)

In the case at bar, respondents are lawyers who were employed by Clackamas County, Oregon, to undertake important professional employment for the benefit of all the land grant counties of Oregon. This they carried out, with a high degree of skill, and with signal success. To say that there was anything improper, or against public policy, in their employment or in their conduct, is to make a gratuitous attack upon two members of the bar of this court, without a scintilla of evidence to support it.

3. *"Appellate Fact Finding"*

The third reason assigned by the Petitioners for granting the writ of certiorari is:

> (3) The factual determination on an appellate level of a causal connection between the *Clackamas* litigation and subsequent favor legislation so far departs from the accepted judicial standards as to call for an exercise of this Court's supervisory jurisdiction.

It is the obvious purpose of Petitioners to bring themselves under that portion of Rule 19(1)(b) of the Revised Rules of this Court which provides that one of the reasons for granting review on writ of certiorari which will be considered by this Court is

> Where a court of appeals . . . has so far departed from the accepted and usual course of judicial pro-

ceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Respondents submit that there was in fact no departure from the usual course of judicial proceedings; that, on the contrary, the action of the Court of Appeals was in complete accord with the usually accepted course of the judicial process.

The Plaintiffs, Lafferty and Merrick, brought an action in the United States District Court for the District of Columbia against the Secretary of the Treasury, the Secretary of the Interior, the Secretary of Agriculture and eighteen counties in the State of Oregon to recover compensation for legal services rendered to the counties.

The Secretary of the Treasury was joined only because he was the stakeholder of a fund belonging to the counties out of which Plaintiffs were to be paid if they recovered a judgment against the counties; the Secretary of the Interior and the Secretary of Agriculture were joined only that they might be enjoined from interfering with such payments. The three Secretaries had no interest in and took no position as to the merits of the controversy between Plaintiffs and the counties, as was plainly stated by the trial judge in his final order wherein he said:

> . . . . and it appearing to the Court that defendants, George M. Humphrey, Secretary of the Treasury; Douglas McKay, Secretary of the Interior; and Ezra Taft Benson, Secretary of Agriculture, take no position on the merits between the plaintiffs and the seventeen counties heretofore named . . .

Thus, the action brought by Plaintiffs, was in essence a suit by lawyers against the counties to recover fees for services rendered, and nothing more.

The final order of the trial judge denied plaintiffs' motion for summary judgment, granted the motion of the seventeen counties for summary judgment, and ordered that judgment be entered in favor of the defendants and against the Plaintiffs.

The case was submitted to the trial judge wholly on written documents, consisting of the pleadings and two affidavits of the Plaintiffs and other affidavits filed by Plaintiffs in support of their position. No witnesses were produced by any party and no oral testimony was taken. In the District Court, the Respondents moved for summary judgment "on the ground that all genuine material issues of fact are matters of judicial notice."

The facts before the trial judge were not in dispute. As he stated in his Memorandum:

> . . . all parties agree that there is no genuine issue of material fact . . .

With all the primary facts in the case agreed upon, the question before the trial judge became one of ultimate inference as to whether, on the basis of the undisputed facts, the Plaintiffs could recover a fee in some amount. The order of the trial judge to enter judgment in favor of the defendants and against the Plaintiffs was in effect a decision that, *as a matter of law,* the Plaintiffs could not recover any fee in any amount for the substantial legal services which, as a matter of admitted fact, they had rendered.

There had been no witnesses in the trial court whose candor and credibility the trial judge had had opportunity to observe. The pertinent documents which had been before the trial court were also before the Court of Appeals. The Court of Appeals was in as good a position as the trial court to draw a proper inference from these documents. The Court of Appeals, consisting of three judges, unanimously decided that the trial judge had

drawn an erroneous inference from the documents and reversed his judgment and remanded the case for further proceedings not inconsistent with the appellate court's opinion.

There is in this case no ground for granting the writ of certiorari on the basis of the importance of the question involved. The question as to whether lawyers are to recover a fee for legal services rendered and the amount of such fee is admittedly an ordinary common law question, far removed from a federal question involving the construction of the federal Constitution or a federal law. The issue presented for decision in this case is in the category of run-of-the-mill litigation essentially local in character. This Court would not be justified in taking jurisdiction on certiorari unless there is presented some procedural question of great importance.

There is in this case no procedural question of importance. The action of the court of appeals in reviewing and passing upon the ultimate legal inference drawn by the trial court from an undisputed state of facts was only an example of the usual and customary exercise of the appellate jurisdiction of the courts of appeal. It is in no respect a departure from the accepted and usual course of judicial proceedings, as is shown by many reported cases. *Sun Insurance Office Limited of London* v. *Be-Mac Transport Co.*, 132 F.2d 535; *United States* v. *Wholesale Oil Co., Inc.*, 154 F.2d 745; *Back* v. *Friden Calculating Co., Inc.*, 155 F.2d 361; *Home Indemnity Co. of New York* v. *Standard Acc. Ins. Co. of Detroit, et al.*, 167 F.2d 919; *Hardt* v. *Heller Bros. Co.*, 171 F.2d 704; *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F.2d 704; *United States* v. *United States Gypsum Co.*, 333 U. S. 364.

In *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (1941), the plaintiff, an attorney, sued the defendant for the recovery of compensation for professional services. The case was tried to the court without a

jury. The question involved on appeal was whether the trial court erred in the amount at which it fixed the plaintiff's compensation. The Circuit Court of Appeals, Third Circuit, said:

> The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and conclusions which, in its opinion, the findings reasonably induce. Such was the law prior to the promulgation of the Rules of Civil Procedure. Brown v. United States, 3 Cir., 95 F.2d 487, 490; Dunn v. Trefry, 1 Cir., 260 F. 147, 148. The new Rules have worked no change in this regard, or with respect to the ultimate conclusions in jury-waived cases in particular.

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), this Court had before it a factual situation similar, on the question here involved, to the factual situation in the case at bar.

In explanation of its action in overturning the finding of the trial court and substituting its own opposite conclusion, this Court (pages 394 and 395) said:

> In so far as this finding [Finding 118] and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice [Citing cases]. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies [Citing cases] or by a jury, [Citing cases] this Court may reverse findings of fact by a

> trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however [Citing cases]. *A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* (Emphasis supplied)

This case is a stronger case in support of the proper power of the appellate court to review and pass upon the action of the trial court than the *Gypsum* case because in the *Gypsum* case the trial court had the opportunity to observe and appraise the candor and credibility of the witnesses, which opportunity was necessarily denied to this Court, because in this case there were no witnesses and no oral testimony.

The action of the Court of Appeals in this case is in conformity with the prevailing practice in courts of appeal in other circuits, and is approved by the rule laid down in *Gypsum* by this Court.

4. *The Petition for Certiorari is premature, because there has been no final judgment in this case.*

The Court of Appeals remanded this case to the District Court to hear evidence on the extent and value of the services of the Respondent lawyers. There has been no final judgment in the court below. The Petitioners seek a writ of certiorari to review the interlocutory action of the Court of Appeals. The power of the court to review interlocutory judgments is to be exercised only in "extraordinary cases," and the fact that the judgment sought to be reviewed is not final may, of itself, furnish sufficient ground for the denial of the application. The writ does not issue to review an interlocutory judgment of the Circuit Court of Appeals "unless it is necessary to

prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville,* 148 U. S. 372 (1893).

In *Hamilton-Brown Shoe Co.* v. *Wolf,* 240 U. S. 251 (1915), the plaintiff's bill for trade mark infringement was dismissed by the trial court. The court of appeals reversed and remanded for an accounting. The Supreme Court denied certiorari. After final judgment, the Supreme Court granted certiorari, and in its decision, referring to writs of certiorari, this court said:

> As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. [Citing cases] And, except in extraordinary cases, the writ is not issued until final decree [Citing cases]. The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; . . ."

The case at bar is a lawsuit brought by two lawyers to recover a fee for services which they admittedly rendered, an action which is in no sense "special and important." This case, *at this stage certainly,* should not occupy the time, the thought, and the attention of the highest court in the land.

A mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit the court's power to review the whole case when it is brought here by certiorari on final judgment, *Toledo Scale Co.* v. *Computing,* 261 U. S. 399 (1923). The interlocutory action becomes merged into the final judgment and is open to review by certiorari, *Hamilton Brown* v. *Wolf, supra.* In such a case, the first denial of the writ of certiorari imports no expression of opinion upon the merits of the case, *House* v. *Mayo,* 324 U. S. 45 (1945).

As said by Mr. Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159 (1922), the writ of certiorari is designed "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. This jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."*

It is a fair assumption that in the event of an adverse final judgment in the courts below, the petitioners will be here again with a second petition for certiorari.

This case involves no federal question and no conflict between the Courts of Appeal. Surely the courts below are competent to decide all that is involved in this case, viz: (1) whether two lawyers are entitled to a fee for their services, and (2) if so, to fix the amount. If there is to be a review on certiorari in this Court, it should be after final judgment.

Reply to Memorandum of the Respondent Government Officials

In the Memorandum filed in this case by the Solicitor General on behalf of the Respondent Government officials, it is said that a question is raised in this Court as to

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* The report of the Senate Judiciary Committee, recommending the passage of the Act of February 13, 1925 (43 Stat. 936), said: "The central thought is this, that litigants have, first, a trial in the district court, and then by appeal or writ of error, a trial in the Circuit Court of Appeals—a court that ranks as high or higher than the supreme tribunals of the states. It is our belief that here ordinary litigation should end, and that the cases should not go to the Supreme Court of the United States unless the questions involved are of grave public concern, or unless serious uncertainty attends the decision of the Circuit Court of Appeals by reason of conflict in the rulings in these courts or the courts of the states." Quoted in *Stamey* v. *United States*, 37 F.2d 188.

whether the District Court had jurisdiction over the counties, and it is stated that although the question "was raised in the Court of Appeals, the opinion is silent on the subject."

The Court of Appeals in its opinion is silent on the subject because no such issue was before it. The Government had frankly admitted that the seventeen defendant counties made a general appearance in the District Court and that there had been "a waiver and abandonment of the jurisdictional defense" by them.

In the "Memorandum for George M. Humphrey, Secretary of the Treasury, Douglas McKay, Secretary of the Interior, and Ezra Taft Benson, Secretary of Agriculture, Petitioners" filed in this case (No. 13,353) in the United States Court of Appeals for the District of Columbia Circuit by Assistant Attorney General Perry W. Morton and Roger P. Marquis and Harold S. Harrison, Attorneys in the Department of Justice, under the caption "Statement of Position," it is stated:

> 1. On the merits of this dispute the appellee government officials are neutral. They neither affirm nor deny that the appellants are entitled to an attorneys' fee payable out of the fund now in the Treasury. It is conceded that approximately $600,000 of the amount retained in the special fund is due and owing to the appellee Oregon counties and to Clackamas County. This fund has been retained only because of this litigation. In these circumstances, if this Court finds that a valid lien for attorneys' fees exists; that all parties will be bound by the decree; and that it will be "a full acquittance to the United States for any and all claims and demands of the parties arising out of or connected with said claim". (*Houston v. Ormes*, 252 U.S. 469, 472 (1920); *Mellon v. Orinoco Iron Co.*, 266 U.S. 121, 125-127 (1924)), appellee government officials will not be prejudiced by a decree directing such payment.

2. It is believed that a jurisdictional matter should be invited to the attention of the Court. As spelled out in *Houston* v. *Ormes*, 252 U.S. 469, 472 (1920), before a mandatory order could be entered directing the named government officials to pay a part of the fund to the plaintiffs, the United States would have to have a proper acquittance against the counties. In other words, before the relief demanded in the appellants' complaint could be granted it must be found that the court has jurisdiction over the appellee counties. Absent such a finding, no relief can be granted against the remaining defendants. *Pilger* v. *Sutherland*, 61 App. D. C. 84, 87, 57 F.2d 604, 607 (1932), quoted with approval in *Morgenthau* v. *Fidelity and Deposit Co. of Maryland*, 68 App. D.C. 163, 165, 94 F. 2d 632, 634 (1937).

In the answer filed on behalf of the appellee officials this issue was raised in order to obtain a specific adjudication that service either was or was not properly effected on the nonresident counties (Jt. App. 12). The seventeen counties answered, raising as their first defense a jurisdictional claim (Jt. App. 7). Subsequent to that time, however, they filed a motion for summary judgment in which they sought an adjudication solely on the merits (Jt. App. 14). In addition, they did not raise the jurisdictional issue in their opposition to appellants' cross motion for summary judgment in the court below. *This procedure we take to be a general appearance and a waiver or abandonment of the jurisdictional defense.* (Emphasis supplied) in these circumstances, any question of the court's jurisdiction may now be out of the case so that the only issues relate to the merits. However, as previously noted, it would require a conclusion that there is jurisdiction over all of the defendants before relief in the nature of mandamus could be granted.

The foregoing statement made by the Government lawyers in the previous Memorandum which they filed in the Court of Appeals is a complete refutation of the Memorandum which they have just filed in this Court. There

is in the case no question as to the jurisdiction of the District Court over the seventeen defendant counties.

Respectfully submitted,

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Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 2561-'54

1 [Filed June 15, 1954]

A. W. LAFFERTY, Fenton Building, Portland 4, Oregon, and RICHARD L. MERRICK, 1624 Eye St., N. W., Washington 6, D. C., PLAINTIFFS

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, Washington, D. C., DOUGLAS McKAY, Secretary of the Interior, Washington, D. C., EZRA TAFT BENSON, Secretary of Agriculture, Washington, D. C., BENTON COUNTY, Corvallis, Oregon, CLACKAMAS COUNTY, Oregon City, Oregon; COLUMBIA COUNTY, St. Helens, Oregon, Coos COUNTY, Coquille, Oregon, CURRY COUNTY, Gold Beach, Oregon, DOUGLAS COUNTY, Roseburg, Oregon, JACKSON COUNTY, Jacksonville, Oregon, JOSEPHINE COUNTY, Grants Pass, Oregon, KLAMATH COUNTY, Klamath Falls, Oregon, LANE COUNTY, Eugene, Oregon, LINCOLN COUNTY, Toledo, Oregon, LINN COUNTY, Albany, Oregon, MARION COUNTY, Salem, Oregon, MULTNOMAH
2 COUNTY, Portland, Oregon, POLK COUNTY, Dallas, Oregon, TILLAMOOK COUNTY, Tillamook, Oregon, WASHINGTON COUNTY, Hillsboro, Oregon, and YAMHILL COUNTY, McMinnville, Oregon, DEFENDANTS

COMPLAINT

(Action for Attorney Fees, Etc.)

1. Jurisdiction is based on diversity of citizenship, the amount in controversy, which exceeds three thousand dollars, exclusive of interest and costs, and other grounds as shown hereinafter.

2. Plaintiff, A. W. Lafferty, is a resident of the City of Portland, State of Oregon, is a duly admitted attorney at law, and is engaged in the general practice of law in the State of Oregon.

Plaintiff, Richard L. Merrick, is a resident of the State of Maryland, is a duly admitted attorney at law, and is engaged in the general practice of law in the City of Washington, District of Columbia.

3. Defendant, George M. Humphrey, is Secretary of the Treasury of the United States, and a non-resident of the State of Oregon.

Defendant, Douglas McKay, is Secretary of the Interior of the United States, and at present is a non-resident of the State of Oregon.

Defendant, Ezra Taft Benson, is Secretary of Agriculture, of the United States, and a non-resident of the State of Oregon.

Said three defendants are stakeholders or custodians of funds belonging to the other defendants named herein, as hereinafter more fully shown.

Benton County, Clackamas County, Columbia County, Coos County, Curry County, Douglas County, Jackson County, Josephine County, Klamath County, Lane County, Lincoln County, Linn County, Marion County, Multnomah County, Polk County, Tillamook County, Washington County, and Yamhill County are all separate political subdivisions of the State of Oregon, and are the owners of 75 per cent of the fund held in escrow, as hereinafter more fully shown.

4. The eighteen Oregon Counties herein named as defendants are justly indebted unto the plaintiffs for legal services performed and rendered for their benefit, in the sum of $600,000.00, payable out of the fund belonging to them now held in escrow by the defendants, George M.

Humphrey, Douglas McKay, and Ezra Taft Benson, as hereinafter more fully shown.

5. Heretofore, on May 26, 1952, plaintiff A. W. Lafferty, in association with the District Attorney of Clackamas County, Oregon, brought an action in the United States District Court for the District of Oregon, wherein Clackamas County, one of the defendants herein, was named as plaintiff, and the then Secretary of the Interior and the then Secretary of Agriculture were named as defendants, seeking distribution of funds held in escrow in the United States Treasury in a special deposit account described as "Deposit Fund Account 12X6875.110, Suspense Agriculture (Forest Service)", which action was dismissed because of improper venue on or about November 19, 1952, whereupon on November 20, 1952, the same action was brought by plaintiff Richard L. Merrick, as attorney for said Clackamas County, in the United States District Court for the District of Columbia, said Clackamas County then and there suing on its own behalf and for the benefit of itself and the other seventeen so-called Oregon and California land grant counties of Oregon, named as defendants herein, said action being brought against the same defendants as those involved in the original action brought in Oregon; namely, the Secretary of the Interior and the Secretary of Agriculture, seeking the same relief as originally prayed for by said Clackamas County. A motion to dismiss said action was sustained by the United States District Court for the District of Columbia on May 20, 1953, on the ground of lack of jurisdiction, and on that date an appeal on behalf of said Clackamas County to the United States Court of Appeals for the District of Columbia Circuit was taken and thereafter vigorously prosecuted and carried to a conclusion, and thereafter said United States Court of Appeals for the District of Columbia Circuit, in a decision dated April 30, 1954, granted to said Clackamas County all the relief prayed for in its complaint.

and specifically directed the United States District Court for the District of Columbia to enter a judgment enjoining the Secretary of Agriculture from interfering with compliance by any other Government official with the terms of the Acts of Congress of June 9, 1916 (39 Stat. 218) and August 28, 1937 (50 Stat. 874), and particularly from interfering with the distribution of the moneys referred to above held in the escrow account aforesaid, and from interfering with the treatment of the lands in Oregon from which the moneys were derived as "land revested from the railroad by the 1916 Act of Congress"; and directing the Secretary of the Interior to issue authorization to the Treasurer of the United States to distribute the said moneys in said escrow account in accordance with the provisions of said Acts of Congress of 1916 and 1937, which provide in effect that 75 per cent of said funds shall go to the eighteen Oregon Counties named as defendants herein, and 25 per cent to the Department of the Interior for administration purposes. The said moneys now held in escrow in said account, as aforesaid, aggregate $8,000,000.00, of which $6,000,000.00 are distributable to the eighteen Oregon Counties named as defendants herein under the terms of said Acts of Congress of 1916 and 1937, and the decision of the said United States Court of Appeals for the District of Columbia Circuit.

6. In and about the filing and conduct of said legal actions, as aforesaid, and the prosecution of said appeal to the United States Court of Appeals for the District of Columbia Circuit, as aforesaid, the plaintiffs herein rendered extensive and valuable legal services for the benefit and advantage and on behalf of said eighteen Oregon Counties, of the reasonable value of ten per cent of $6,000,000.00, the amount distributable to said Oregon Counties, by reason whereof the said eighteen Oregon Counties named as defendants herein are justly indebted

unto plaintiffs in the said sum of $600,000.00.

7. After the rendition of the decision of the United States Court of Appeals for the District of Columbia Circuit on April 30, 1954, as aforesaid, the Congress, by reason of the activities of certain members of the Oregon delegation in Congress, which activities plaintiffs believe were and are designed and intended to supersede the judgment and determination of said United States Court of Appeals for the District of Columbia, and to prevent plaintiffs from collecting their just fees and compensation for their services, as aforesaid, passed an Act in the Senate on May 20, 1954, and in the House of Representatives on June 9, 1954, providing, among other things, for the payment of the funds impounded in said escrow account, as aforesaid, to the eighteen Oregon Counties named as defendants herein in the same manner and amounts as directed in the decision of said United States Court of Appeals for the District of Columbia Circuit, which said Act is about to be approved by the President, and said defendants, George M. Humphrey, Douglas McKay, and Ezra Taft Benson, are about to pay or cause to be paid out said funds to said counties ostensibly under the provisions of said Act of Congress and not under the decision of the said United States Court of Appeals for the District of Columbia Circuit, and thereby and in that manner to supersede and nullify the decision of said Court of Appeals, and to render collection by plaintiffs of just compensation for their services, as aforesaid, extremely difficult or impossible.

WHEREFORE, plaintiffs pray:

1. For judgment against the said defendants and each and all of them for the sum of $600,000.00, besides costs.

2. That the defendants, George M. Humphrey, Douglas McKay, and Ezra Taft Benson be directed to deposit or cause to be deposited in the registry of this Court

sum of $600,000.00 from the funds in said escrow account, to abide the judgment of this Court herein.

3. Or, in the alternative, that said defendants, George M. Humphrey, Douglas McKay, and Ezra Taft Benson, their agents, servants and attorneys, be restrained and enjoined from paying to the defendants, the eighteen Oregon counties named herein, the sum of $600,000.00 pending the judgment of this Court herein.

6 4. That service on the non-resident defendants, the eighteen Oregon Counties, be made by publication or by substituted process having the same effect as publication, or in such other manner as this Court may direct.

5. For such other, further or different relief as to the Court may seem just and proper or the nature of the case may require.

/S/ A. W. LAFFERTY,
Fenton Building,
Portland 4, Oregon,

/S/ RICHARD L. MERRICK,
1624 Eye St., N. W.
Washington 6, D. C.
Plaintiffs pro se.

DISTRICT OF COLUMBIA, ss:

Richard L. Merrick, being first duly sworn according to law on oath deposes and says that he is one of the plaintiffs in this action; that he has read the foregoing complaint by him subscribed and knows the contents thereof, and that he verily believes the same to be true.

//S/ RICHARD L. MERRICK

Subscribed and sworn to before me this 15th day of June, 1954

/S/ MARIANNA D. WAGGAMAN
Notary Public, D. C.

(Caption Omitted)

19 [Filed Dec. 21, 1955]

MOTION FOR SUMMARY JUDGMENT

Come now Benton County, Columbia County, Coos County, Curry County, Douglas County, Jackson County, Josephine County, Klamath County, Lane County, Lincoln County, Lynn County, Marion County, Multnomah County, Polk County, Tillamook County, Washington County and Yamhill County, all of the State of Oregon, by their attorneys, and move the Court, pursuant to Rule 56 F. R. C. P., for summary judgment, and for reason therefor say that all genuine, material issues of fact are matters of judicial notice about which there can be no dispute and that defendants should have judgment, since the plaintiffs' efforts were unsuccessful in bringing about distribution of the fund which their litigation contemplated and since plaintiffs were not retained by these movants, all as more fully appears in the attached Memorandum of Points and Authorities.

HOGAN & HARTSON

By Paul R. Connolly /s/
810 Colorado Building
Washington 5, D. C.
Frank S. Sever /s/
510 Corbett Building
Portland, Oregon
Attorneys for the Oregon County Defendants, except Clackamas County, Oregon.

20 (CERTIFICATE OF SERVICE)

No. 429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BENTON COUNTY, OREGON, ET AL., *Petitioners*,

v.

A. W. LAFFERTY, RICHARD L. MERRICK, and ROBERT B. ANDERSON, Secretary of the Treasury, ET AL., *Respondents*

BRIEF OF A. W. LAFFERTY, PRO SE

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BRIEF OF A. W. LAFFERTY, PRO SE

I have carefully read and studied the long, arid, vacuous and scolding petition for Certiorari, as filed by Paul R. Connolly, Esquire, 810 Colorado Building, Washington 5, D. C., Hogan & Hartson, same address, of Counsel.

No Oregon lawyer appears anywhere in the paper filed as having any connection with the move.

Nothing New in Petition

Petition is a rehash of the brief filed by Mr. Connolly in the Court below, its manifold errors and misstatements being answered by me there by my Brief, Pro Se, filed Feb. 13, 1957, and attached hereto as Appendix—C. With others, Mr. Connolly and I argued this matter quite fully before the Court of Appeals Feb. 18, 1957, and the decision in favor of a fee for Mr. Richard L. Merrick and myself followed June 13, 1957.

The decision of the Court of Appeals of June 13, 1957, is in itself a complete and masterful answer to the Certiorari application now lodged here. It is a short opinion, only a few pages. Its

authors, Chief Judge Edgerton and Circuit Judges Prettyman and Wilbur K. Miller knew their subject. They were the panel that decided the original escrow fund suit, involving, as it turned out, over ten million dollars when released in 1955, which case the Court of Appeals and its staff kept under research and advisement for over 5 months.

Print of Assailed Opinion Attached.

Appendix—A

I beg to attach hereto, as Appendix—A the Government print of the short opinion of the Court of Appeals of June 13, 1957, declaring reasonable compensation was due Mr. Merrick and myself for our work in the escrow fund case.

Appendix—B Throws Further Light

Also, the Per Curiam Order of Chief Judge Edgerton and Circuit Judges Prettyman and Wilber K. Miller, in Chambers, Sept. 11, 1957, and my short printed brief in that matter, in which the one paragraph opinion reads as follows:

> "Upon consideration of the motion of appellees Benton County and sixteen other Oregon Counties to recall the judgment and copy of the opinion of this Court from the District Court and to stay reissuance thereof, and of the answer of A. W. Lafferty, it is
>
> "ORDERED by the Court that the aforesaid motion be, and it is hereby, denied."

Appendix—C

In my brief filed in the Court of Appeals Feb. 13, 1957, (Attached as Appendix—C hereof) appears the following:

"STATEMENT

> "This suit, No. 13,353, is inseparably intertwined with suit No. 11,844, recently litigated in this Court. Indeed, the present suit, which is for the declaration of a reasonable fee for Richard L. Merrick and A. W. Lafferty, both Members of the Bar of this Court, who successfully prosecuted suit No. 11,844, must turn upon the "favorable results" to 18 Oregon counties accomplished in

11,844 by the labors of this Court and the work of Merrick and Lafferty as officers of this Court.

"Suit 13,353 is ancillary to suit No. 11,844, a "petition" addressed to this Court under its ancient equity powers to allow its officers, its solicitors, for work done respecting a trust fund, suitable compensation out of the fund, provided "favorable results" were obtained for those entitled to participate, and who do participate, in such "favorable results".

"*Sprague* v. *Ticonic National Bank, 307 U. S. 161.*

"Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the Federal Courts".

49 A.L.R. 1149:

"The custom of allowing compensation to solicitors out of the fund in court originated, as it appears, in England, in the courts of equity, where costs as between solicitor and client were allowed out of the fund to solicitors of a complainant, on the theory that, where one litigant has proceeded, and at his own expense has created, or preserved, or protected a fund, and others are entitled to claim, and do claim, in the results of his labor, it was not fair that the person who had taken the risk, costs, and expenses of litigation should bear all the costs, but that *those who share in the fruits of it* should bear their fair pro rata share; this rule simply went to the extent that, where *meritorious results* were actually achieved, those who lay by in inaction should not be allowed to await the result, escape all expense in case of loss, but, if the suit proved successful, share the actual benefits by receiving their portion of the fruits of success without contributing their share of the expenses. . . ." (*Underscoring supplied*).

Respectfully submitted,

A. W. LAFFERTY, *Pro Se,*
518 H Street, N. W.,
Washington 1, D. C.

October 5, 1957

N.W.
WASHINGTON 1, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13353

A. W. LAFFERTY and RICHARD L. MERRICK, APPELLANTS

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, et al., and BENTON COUNTY, Corvallis, Oregon, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

---

Decided June 13, 1957

Messrs. A. W. Lafferty, Byron N. Scott, and *Donald C. Walker,* of the bar of the Supreme Court of Oregon, *pro hac vice,* by special leave of Court, for appellants.

Mr. Paul R. Connolly for appellee Benton County, Corvallis, Oregon, and certain other appellees. *Mr. Harold S. Harrison,* Attorney, Department of Justice, with whom *Mr. Roger P. Marquis,* Attorney, Department of Justice, was on the brief, for appellee George M. Humphrey, Secretary of the Treasury, and certain other appellees.

Before EDGERTON, Chief Judge, and PRETTYMAN and WILBUR K. MILLER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a suit for a class-action attorney fee. It is another step in a long controversy which began in acts of Congress in 1860-1870. The

facts are recited in some detail in our opinion in *Clackamas County, Ore.* v. *McKay.*[1] They need not be repeated here.

In our opinion and decision in that case we held that acts of Congress in 1916[2] and 1937[3] imposed upon the various executive officials involved a mandatory duty to distribute to the Oregon counties the money accumulated in the special fund designated "The Oregon and California land-grant fund". We ordered a remand for proceedings in accordance with that view. That was on April 30, 1954.

A petition for rehearing was filed, and on June 24, 1954, while the petition was pending, Congress passed an act[4] which, *inter alia,* directed that the funds theretofore derived from the lands and placed in the special fund "shall be disposed of in accordance with the provisions of title II of the Act approved August 28, 1937 (50 Stat. 874) as hereby amended".

In the presentation to the Congress of the bill which became the act, it was made abundantly clear that the decision of this court had settled the question of the status of the disputed lands but that the court did not attempt to decide the question of jurisdiction for management purposes as between the Department of the Interior and the Department of Agriculture. The distribution of the funds depended upon the former question; if the lands were "O & C" lands the funds belonged in part to the counties, no matter what Department had management of them. The act did not purport to change the court's decision. It effected exactly what the court ordered, distribution of the funds pursuant to the 1937 act, and it

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[1] 94 U.S. App. D.C. 108, 219 F.2d 479 (1954).

[2] 39 STAT. 218.

[3] 50 STAT. 874.

[4] 68 STAT. 270, 43 U.S.C.A. § 1181g.

decided the dispute as to management, a matter concerning which the court had said nothing.

The legislative history of the 1954 act clearly shows the intention behind it. Senator Cordon, who sponsored the bill, told the Senate:

> "Mr. President, the purpose of the bill is to determine legislatively a jurisdictional question which has existed between the Department of Agriculture and the Department of the Interior for many, many years. * * *
>
> * * * *
>
> "The question of the character and class of the lands reached the courts in 1925, in a suit brought by the Government against the railroad company for an accounting in connection with the revestment and the reciprocal obligation of the Government and the company. In that case the determination of the Court was that the 472,000 acres were revested O. & C. grant lands.
>
> "However, the Court did not attempt to make any determination with respect to the administration of the 472,000 acres in question. That issue was not properly before the Court. There is a series of decisions with respect to the legal status of the lands. The latest decision was rendered only a couple of weeks ago—on April 30, 1954—in the United States Circuit Court of Appeals for the District of Columbia. All decisions have been uniform with respect to the law and its applicability to these lands.
>
> "However, there has remained the question of jurisdiction for management purposes. * * *
>
> * * * *
>
> "Because of the fact that there is a distribution of funds from the O. & C. Railroad lands to local governmental units much greater than the distribution to local units in the case of Forest Service lands, the question of the legal character of the 472,000 acres is of great importance to the people of Oregon. *The courts have determined that question.* * * *
>
> "This bill meets the overall situation by providing that the 472,000 controverted acres are declared to

be revested O. & C. lands. This is precisely what the Court declared them to be.

• • • •

"Thus, the bill, S. 2225, takes care of both the administrative question and the jurisdictional one as far as the 472,000 acres are concerned."[5] (Emphasis supplied.)

When the bill reached the floor of the House the following colloquy occurred:

"Mr. WICKERSHAM. Mr. Speaker, reserving the right to object, and I make this reservation at the request of two of our former colleagues, I would like to ask the gentleman from Oregon [Mr. Ellsworth] a question. This measure is a followup and confirms a decision of the District of Columbia Circuit of the United States Court of Appeals on April 30, 1954, in which action A. W. Lafferty, a former Member of Congress, represented Clackamos [*sic*] County, Oreg., and others and won the decision. Is this correct?

"Mr. ELLSWORTH. That is correct.

• • • •

"Mr. WICKERSHAM. Is it a fact that this bill confirms the decision of the court of appeals which directed the payment of $7 million or $8 million to 18 Oregon counties, including Clackamos [*sic*] County, all of which 18 counties thereby benefiting by the action instituted by A. W. Lafferty, as attorney, and benefited from the said court decision? This is correct, is it not?

"Mr. ELLSWORTH. That is correct."[6]

On October 21, 1954, the petition for rehearing was denied in this court, and our mandate issued. We noted that as of that time no statement had been made that the Secretaries had distributed the funds.

On February 17, 1955, the Government applied to the Supreme Court for a writ of certiorari, saying that the

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[5] 100 CONG. REC. 6886 (1954).

[6] 100 CONG. REC. 7969 (1954).

Secretary of Agriculture had by that time, pursuant to the new act, transferred the funds to the Secretary of the Interior and he in turn had distributed to the counties the parts of the accumulated funds due them, retaining a substantial sum on account of the present proceeding. The Government officials now stand neutral in the matter.

On April 18, 1955, the Supreme Court granted certiorari, vacated our judgment, and remanded the case with directions to dismiss as moot.[7]

Our present appellants, Lafferty and Merrick, are the lawyers who conducted the lawsuit above discussed. They filed an action for attorney fees, naming the Secretaries defendants, as stakeholders of the fund, and the Oregon counties as the debtor defendants. The defendant counties, with the exception of Clackamas County, moved for summary judgment on two grounds: (1) that these lawyers' efforts to bring about a distribution of the funds had been unsuccessful and (2) that the lawyers had not been retained by movants. The District Court granted the motion.

Two questions are before us. The first is whether the lawsuit conducted by these appellant lawyers resulted in benefit to the counties. To say that it did not result in such a benefit seems to us little more than a play on words. Many efforts had been made prior to 1954 to persuade Congress to settle the controversy specifically and to direct the payment of the funds to the counties. None had succeeded. As the *Congressional Record* shows, when the bill came before Congress in 1954 the members were told specifically and emphatically that this court had settled the legal character of the lands, and in the House they were told that the bill "confirms" the decision of this court. The act finally adopted directed payment pursuant to the 1937 statute, which is what this court had ordered.

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[7] 349 U.S. 909, 99 L.Ed. 1244, 75 S.Ct. 599.

If we thought Congress intended to divest a court decree of effectiveness after it had been validly rendered by a court of competent jurisdiction, we would have a serious question as to the validity of the congressional act. But clearly Congress had no such intention. Quite the contrary, it accepted the court decision as settling the controversy as to the nature of the lands and went on from there to prescribe the future management.

To say that the action was unsuccessful because pending certiorari the Government paid over the money which was the sole subject of the litigation, seems to us to be another play on words. A party does not nullify a court order by complying with it.

Thus we are of clear opinion that the lawyers who conducted the litigation performed services which were of value and achieved substantial benefits for the counties.

Upon the second point, that only Clackamas County engaged these lawyers, *Sprague* v. *Ticonic Bank*[8] is dispositive. In the case at bar there was a definite, earmarked fund. The litigation resulted in a substantial benefit to all the counties. They all participated in the distribution. The complaint was brought by Clackamas County on behalf of itself and the other counties.

It was said by the Government in its petition for certiorari in the Supreme Court in 1955 that the amendment of the 1937 act contained in the 1954 act resulted in "different payments to the counties under the 1954 Act than under the provisions of the 1937 Act." The amendment may have resulted in different payments to the *respective* counties, but it in no way affected, even by a penny, the total amount payable to all the counties. The lawsuit was to determine whether the whole sum was payable to all the counties. What portion each

[8] 307 U.S. 161, 83 L.Ed. 1184, 59 S.Ct. 777 (1939).

county would get was not involved. The service rendered by these attorneys was in respect to the whole fund as payable to all of the counties. The formula for distribution among the several counties had nothing to do with their services.

The judgment of the District Court will be reversed and the case remanded for the determination of the proper amounts of fees to be paid these appellant lawyers from the fund retained in the hands of the Government.

Reversed and remanded.

MEMORANDUM AND SUGGESTIONS OF A. W. LAFFERTY, ONE OF APPELLANTS, OPPOSING ALLOWANCE OF "MOTION TO RECALL JUDGMENT AND CERTIFIED COPY OF OPINION" UNTIL AND INCLUDING SEPTEMBER 11, 1957

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,353

A. W. LAFFERTY and RICHARD L. MERRICK, *Appellants,*

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, FRED A. SEATON, Secretary of The Interior, EZRA TAFT BENSON, Secretary of Agriculture, et al

Appellees

A. W. LAFFERTY, *Pro Se,*
Member of the Bar of the Oregon Supreme Court and of this Court,

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WILSON · EPES PRINTING CO. · RE 7-6002 · WASHINGTON 1, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,353

A. W. LAFFERTY and RICHARD L. MERRICK, *Appellants,*

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Appellees

MEMORANDUM AND SUGGESTIONS OF A. W. LAFFERTY, ONE OF APPELLANTS, RESISTING ALLOWANCE OF "MOTION TO RECALL JUDGMENT AND CERTIFIED COPY OF OPINION" UNTIL AND INCLUDING SEPTEMBER 11, 1957, AS BEING DILATORY, OPPRESSIVE, AND UNNECESSARY TO ITS DECLARED OBJECTIVE.

Point I.

Appellant A. W. Lafferty is in his 83rd year; has been an active member of the bar for over 60 years; for past seven years has worked almost continuously on the O & C land litigation involved in this proceeding, in U. S. District Court of Oregon and Federal Courts in Washington, D. C., and on other phases of the O & C Land litigation has devoted much of his time since September 16, 1907.

Point II.

Mr. Connolly's motion seeks to "recall the judgment of this Court of June 13, 1957, and the certified copy

of this Court's opinion of that date which was sent to the District Court July 1, 1957."

Under the facts, if certiorari is to be petitioned for, such action should be taken promptly. Appellant lawyers, for whom the right of reasonable fee has been declared by this Court, have not the slightest thought of moving for judgment in District Court fixing the amount of their fees until Appellees, represented by Mr. Connolly, have had all the time allowed by law, if they choose to take it, to petition for certiorari, though fair play would seem to dictate that such petition be filed in the immediate future if it is to be filed at all.

Point III.

The "recall and stay" maneuver asked for by Mr. Connolly's motion "until and including Sept. 11, 1957", if granted by the Court, might conceiveably work public sentiment injury to the cause of Appellant lawyers in Oregon by creating the false impression there that this Court had receded from its judgment of June 13, 1957, when that would not be the case at all.

IF THERE IS TO BE ANY "RECALL" BY THIS COURT OF ITS DECISION OF JUNE 13, IT SHOULD BE TO ENABLE THIS COURT TO FIX REASONABLE ATTORNEYS' FEES HEREIN, FOR THIS COURT KNOWS THE FACTS AND NO OTHER COURT DOES.

It is now over three years since this Court on April 30, 1954 (after holding the matter under investigation and research for over five months) rendered its memorable decision in favor of the 18 O & C Counties.

The present fee suit, based thereon, itself was filed in June, 1954, and has been pending over three years. The personnel of some of the 18 Oregon County Courts

have completely changed. Some of the important witnesses have moved, others have died. To delay this case further would be hazardous to this appellant's rights.

The present fee suit came on for hearing before Judge McGarraghy, in District Court, early in 1956. On appeal to this Court, and after full argument, briefing, and consideration of the fee matter for a period of four months by this Court, another opinion marked by its clarity, and mastery of all the intricacies of the litigation, was handed down in favor of reasonable attorneys' fees. Now, Mr. Connolly wants to upset that decision.

It would be poetic justice if this Court should recall the whole matter from District Court, but only for the purpose of spelling out a specific amount which would constitute reasonable attorneys' fees herein, *as it has the power to do.*

No Testimony Necessary Where Services Performed in Presence of Court

Where attorneys seek to recover fees for services rendered in presence of the court, no testimony need be offered as to their reasonable value, since the court itself is competent to pass upon the question of reasonable value of such services. *Mill City Plastics,* 129 Fed. Supp. 86, followed *Northtown Theatre Corp.* v. *Nickelsen,* 226 F 2d 212.

Determination of fees of counsel for successful plaintiff in a class action involves consideration whether attorney's compensation is contingent upon recovery, the amount of effort *necessarily expended* to meet and solve any novel and complicated problems involved, the standing and reputation for excellence of the attorneys and their associate counsel, and the excellent work and standing of opposing counsel—*Paris* v. *Metropolitan Ins. Co.* 94 Fed. Supp. 356.

It would seem incongruous that this Court, knowing the services rendered before it, should be compelled by any arbitrary rule of practice, to remit such a complicated case as this to *any court*, other than *itself*, for the purpose of fixing appropriate attorneys' fees. I AM WILLING TO ACCEPT ANY FEE THIS COURT OF APPEALS MAY FIX. But I would hope to get it before I drop. Like the citizen, no attorney or set of attorneys is, or should be permitted to be, above the law. And this Court has buttressed that principle in this litigation.

The opposition is compelling this Appellant to spend as much time, and perform as much labor, to collect his fee, as he spent in winning the original class-action for the benefit of the 18 Oregon Counties.

IN ILLINOIS CASE RECENTLY DECIDED SUPERIOR COURT JUDGE FISHER ALLOWED A FEE OF 1½ MILLION DOLLARS TO ATTORNEY LOUCKS IN A TEN MILLION DOLLAR TRUST FUND CASE

The following press report was published on page 7 of The Oregonian, Portland, Oregon, March 5, 1957:

"COURT OKEHS LEGAL FEE"

"Chicago (AP)—Legal fees totaling nearly $2,000,000—including one for $1,500,000—were approved Monday in a court fight over a $10,000,000 estate.

"Superior Judge George M. Fisher granted the $1,902,822 for six attorneys and a trust firm engaged in a ten-year contest over the estate of Mollie Netcher Newbury. Mrs. Newbury's first husband, Charles Netcher, Sr., was founder of the Boston store in Chicago's loop.

"The estate battle ended September 24 last year when Judge Fisher ordered Mrs. Mollie Netcher Bragno, granddaughter of Mrs. Newbury, to turn back $16,728,742 inherited from Mrs. Netcher to the principal trust estate of the senior Netcher.

"Will Terms Violated"

"The court found that Mrs. Newbury had violated the terms of her husband's will and failed to fulfill her duties as trustee of her estate.

"In a settlement agreement, Mrs. Bragno surrendered $10,500,000 to the Netcher estate, which eventually will be shared by Mrs. Bragno and Mrs. Francice Netcher Bushkin, another granddaughter of the Boston store founder.

"The largest fee approved was $1,500,000 for attorney Vernon Loucks, who also received $61,000 reimbursement for expenses. Loucks represented Mrs. Bushkin and her mother, Mrs. Ethel Chagnon."

Amount Involved in Illinois Case Virtually Same as in Case at Bar

The Oregon land grant trust fund turned out to be over $10,000,000, and the motion filed for summary judgment (J.A. 19), if allowed for $600,000 would equal a fee of less than 3 per cent for each of Appellant lawyers, whereas Mr. Loucks was allowed a fee of $1,500,000, plus expenses, in the Chicago case where the total trust fund involved was virtually the same as in the case at bar, with this important exception, in favor of the case at bar: The 18 Oregon Counties not only received 75 per cent of the fund of over $10,000,000 which had *accrued, but they got the 472,000 acres of controverted land back, as acknowledged O & C lands,* which will give annual benefits to the 18 Counties for all the long future.

CONCLUSION

Upon the showing herein made, Appellant A. W. Lafferty, now prays the Court:

1. To disallow Mr. Connolly's motion to recall and stay the judgment of this Court of June 13, 1957.

2. Or, in the alternative, if any action be taken, that it be an Order of this Court, of its own motion, recall-

ing its decision of June 13, 1957, for the purpose of modifying its decision of that date, by designating specific amounts as reasonable attorneys' fees for each of the two appellant lawyers.

Respectfully submitted,

A. W. LAFFERTY, *Pro Se*

JAMES P. KEM
Of Counsel:

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum, Suggestions, and Brief, of A. W. Lafferty, Pro Se, was mailed this 20th day of July, 1957, to Byron N. Scott, Esquire, Attorney for Richard L. Merrick, Wyatt Building, Washington 5, D. C., to Perry W. Morton, Assistant Attorney General, Department of Justice, Washington, D. C., Attorney for Appellees George M. Humphrey, Fred A. Seaton, and Ezra Taft Benson, and to Paul R. Connolly, 810 Colorado Building, Washington 5, D. C., who signed the Motion herein replied to as "Attorney for Appellees Benton County, et al."

A. W. LAFFERTY,
518 H Street, N. W.
Washington 1, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,353 April Term, 1957

A. W. Lafferty,
Richard L. Merrick,

Appellants,

v.

Robert T. Anderson, Secretary of the Treasury, et al., and Benton County, Corvallis, Oregon, et al.,

Appellees.

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 11 1957
Joseph W. Stewart
CLERK

Before: Edgerton, Chief Judge, Prettyman and Wilbur K. Miller, Circuit Judges,

in Chambers.

ORDER

Upon consideration of the motion of appellees Benton County and sixteen other Oregon Counties to recall the judgment and copy of the opinion of this Court from the District Court and to stay reissuance thereof, and of the answer of appellant A. W. Lafferty, it is

ORDERED by the Court that the aforesaid motion be, and it is hereby, denied.

Per Curiam.

Dated: September 11 1957

MOTION OF A. W. LAFFERTY, ONE OF APPELLANTS, FOR ENLARGEMENT OF ORAL ARGUMENT TIME FOR ALL PARTIES, AND FOR LEAVE TO FILE BACKGROUND MATERIAL HERETO ATTACHED WHICH WAS SERVED UPON ALL COUNSEL OF RECORD JANUARY 30, 1957

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,353

A. W. LAFFERTY and RICHARD L. MERRICK,
Appellants

v.

GEORGE M. HUMPHREY, Secretary of the Treasury, DOUGLAS McKAY, Secretary of The Interior (Fred A. Seaton now substituted), EZRA TAFT BENSON, Secretary of Agriculture, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia

---

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,353

A. W. LAFFERTY and RICHARD L. MERRICK,
Appellants

v.

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Appellees.

Appeal from the United States District Court for the District of Columbia

---

MOTION OF A. W. Lafferty, Pro Se, one of Appellants for enlargement of the time for oral argument beyond 45 minutes to each side, and for leave to file the background material, submitted herewith, which was served upon all counsel of record January 30, 1957

Comes now A. W. Lafferty, Pro Se, co-appellant, and for the reasons herein shown, requests and respectfully moves the Court as follows:

1. That the time for oral argument be enlarged beyond 45 minutes to each side.

2. For leave to file the background material, 26 copies, submitted herewith, which material was served upon all counsel of record January 30, 1957.

STATEMENT

This suit, No. 13,353, is inseparably intertwined with suit No. 11,844, recently litigated in this Court. Indeed, the present suit, which is for the declaration of a reasonable fee for Richard L. Merrick and A. W. Lafferty, both Members of the Bar of this Court, who successfully prosecuted suit No. 11,844, must turn upon the "favorable results" to 18 Oregon counties accomplished in 11,844 by the labors of this Court and the work of Merrick and Lafferty as officers of this Court.

Suit 13,353 is ancillary to suit No. 11,844, a "petition" addressed to this Court under its ancient equity powers to allow its officers, its solicitors, for work done respecting a trust fund, suitable compensation out of the fund, provided "favorable results" were obtained for those entitled to participate, and who do participate, in such "favorable results".

Sprague v. *Ticonic National Bank*, *307 U. S. 161:*

> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the Federal Courts".

49 A.L.R., 1149:

> "The custom of allowing compensation to solicitors out of the fund in court originated, as it appears, in England, in the courts of equity, where costs as between solicitor and client were allowed out of the fund to solicitors of a complainant, on the theory that, where one litigant has proceeded, and at his owr expense has created, or preserved, or protected a fund, and others are entitled to claim, and do claim, in the results of his labor, it was not fair that the

person who had taken the risk, costs, and expenses of litigation should bear all the costs, but that *those who share in the fruits of it* should bear their fair pro rata share; this rule simply went to the extent that, where *meritorious results* were actually achieved, those who lay by an inaction should not be allowed to await the result, escape all expense in case of loss, but, if the suit proved successful, share the actual benefits by receiving their portion of the fruits of success without contributing their share of the expenses. . . ." (*Underscoring supplied*).

Government Has Consented to Present Suit For Declaration of Suitable Fee

The following document, which is virtual consent of the Government that the present suit be entertained by this Court, and certainly reflecting the opinion of high Federal officials that a suitable fee might amount to $600,000 is on File in the Treasury Department, Department of the Interior, Department of Agriculture and Department of Justice:

"INTERDEPARTMENTAL UNDERSTANDING OF SEPTEMBER 22, 1954

"IT IS HEREBY AGREED, that,

"1. Pursuant to the request of the Department of Justice by letter dated July 12, 1954, to Department of Agriculture, $600,000.00 will be retained in special deposit account until such time as the A. W. Lafferty, et al., v. George M. Humphrey, et al., CIVIL No. 2561-54, case is adjudicated. (*Note: 2561-54 is present 13,353 on Appeal*).

"2. In accordance with an informal request of Aug. 18, 1954, (confirmed by letter of Aug. 20, 1954) by the Department of Justice to the office of the Solicitor, Department of Agriculture, the full amount now in the special deposit account ($7,695,498.12) as of June 30, 1954, will be retained until such time as the Clackamas County, Oregon vs. Douglas McKay et al, No. 11844, case is *adjudicated*.

"3. On advice of the Department of Justice that the Clackamas case has been *adjudicated* the Forest Service will transfer to the Bureau of Land Management for disposition in accordance with Public Law 426—83d Congress, 2d Session, the sum of $7,695,498.12, or such other amount as is not requested by the Department of Justice to be retained or is not otherwise provided by the *decree*.

"Signed, this the 22d day of September, 1954.

BUREAU OF LAND MANAGEMENT,
DEPARTMENT OF INTERIOR,

By Depue Falc
Title Executive Officer

BUREAU OF FOREST SERVICE,
DEPARTMENT OF AGRICULTURE,

By Howard Hopkins
Title Acting Chief."

Printed Record Now Before This Court on Appeal good as far as it Goes, but Lean

The foregoing "Agreement", and many other public documents relevant to the present Appeal, 13353, of which this Court may properly take judicial notice, and is entitled to have called to its attention, have been gathered together and arranged in proper order in a huge "binder", by A. W. Lafferty, which he will bring to Court February 18, 1957, and will desire to refer to numerous of such documents. Hence, and for other cogent reasons, hereinafter to appear, the time for oral argument should be generously enlarged. By the same token leave to file the background material, as requested in this motion, should be allowed.

EVEN ON PRESENT LEAN RECORD LOWER COURT SHOULD BE REVERSED AND DIRECTED TO ALLOW APPELLANTS' COUNTER MOTION (PENDING BELOW) FOR A SUMMARY JUDGMENT IN THEIR FAVOR, AND IN THE SUM OF $600,000, HALF THEREOF TO EACH OF THE TWO APPELLANTS.

The fee asked of $600,000 for the two attorneys, one in Oregon, and the other in Washington, D. C., amounts to but a fraction over six per cent of the escrow fund which had *accrued* as of June 30, 1954, which amount was over nine million dollars.

True, the amount *actually in* the fund June 30, 1954, was $7,695,498.12, but that only included income from sales up to June 30, 1953. It requires several months after the end of any fiscal year to audit and pay into the fund the sales for such year. So, the sales for fiscal year ending June 30, 1954, were not in the fund till November, 1954, when the amount was swelled to upwards of *nine million dollars*. See the audit of November, 1954, attached to my affidavit in Judge Holtzoff's court December, 1954, on motion for judgment on the Mandate of this Court of November, 1954. (No. 11844 in Court of Appeals was No. 5852-52 in U. S. District Court).

So, at the lowest figure, over nine million dollars was actually in the disputed fund, the escrow fund, when Public Law 426 was signed June 24, 1954, and when Appellants' Fee Suit, No. 13353, now before this Court was filed June 15, 1954.

The 18 Oregon County beneficiaries have now actually received in hand all of that sum in excess of nine million dollars, save and except $800,000 still held back on request of the Attorney General to await the outcome of suit 13,353 now before this Court, and other O & C litigation pending in the Court below, specifically suit 175-55,

filed in January 1955, by Hogan and Hartson, and Frank S. Sever, as attorneys for the same "17 Counties" said attorneys, represent as "defendants" in the case at bar, to have a fee declared for Merrick and Lafferty, in successful suit (11844 in this Court) which resolved the long Departmental dispute over a controverted fund of over nine million dollars, which has now been distributed to 18 Oregon Counties, except for the $800,000 before mentioned.

To Pin-Point the Present Picture

1. The original Clackamas County suit (11844 in this Court) to resolve the dispute over the controverted fund, and require distribution of it under the McNary Act of 1937 (which is still the distributive Act) was first brought in the U. S. District Court of Oregon, at Portland, in May 1952. Dismissed on venue grounds November 1952, the same Complaint, word for word, was re-filed in U. S. District Court here in November, 1952, was argued before Judge Holtzoff May 20, 1953, before this Court of Appeals November 1953, and decided in favor of the 18 Oregon Counties (it having been a class action as declared in the Complaint) and as it turned out to be. The decision of this Court was handed down April 30, 1954.

2. Subsequent to that favorable decision, Pub. Law 426 was passed which likewise directed that the controverted fund be distributed under the McNary Act, of 1937, and to all intents and purposes directed distribution exactly as this Court had determined the fund should be distributed.

3. For some reason, hard to fathom, 17 Oregon Counties, under the lead of the so-called "O & C County Association", a private organization, and not the 17 Oregon County Courts of said counties, opposed the carrying out of the April 30, 1954 favorable decision of this Court of Appeals which was to their benefit, but fought it tooth

and nail with dilatory motions and other maneuvers, all of which were rebuffed by this Court, both in Panel and In Banc. (See the Record of 11844).

4. Finally, to cap the climax, in January, 1955, the "O & C County Association" caused to be initiated in the District Court here (still pending, 175-55) a suit almost identical with the original Clackamas County suit, and asking for the same identical relief, distribution under the McNary Act of 1937. The Complaint in 175-55 said that Secretary McKay and the Forestry officials had been "confused and confounded" by the decision of this Court of Appeals! See that remarkable complaint. So they wanted a fresh decree, providing for the same identical relief, but in their name, in the name of the "O & C County Association".

Affidavits Favorable to Appellant Lafferty in Court Below, not included in Joint Appendix, Should be Considered by this Court

I have in my "binder" photostatic copies of the omitted affidavits made for me by the photostat room of the U.S. District Court in this Building. Why they were omitted from the Joint Appendix on Appeal I do not know. In my view it was unfortunate that they were omitted. Each affidavit bears the following stamp: "Filed Feb 11 1956, Harry M. Hull, Clerk".

I beg to quote here briefly from some of said affidavits:

1. HOMER D. ANGELL, 16 years Member of Congress from Oregon, from 1939 to 1955:

> ". . . I have known Mr. Lafferty personally for half a century and as a colleague of the Oregon State Bar. That Mr. Lafferty was a Member of Congress from the Second and Third Congressional Districts of Oregon from 1911 to 1915 and that I have personal knowledge of his efforts in the Oregon and California land grant controversy and that he has

spent considerable years in making a thorough study and has on different occasions represented a litigant in establishing certain principles in the long and complex controversy. Mr. Lafferty, both as a lawyer for Clackamas County and as a public citizen, has done a great deal to enlighten the people of Oregon as to the Oregon and California land grant controversy and has done a great deal through the law suit involving Clackamas County to alert the people of Oregon and the members of Congress to the issues involved".

2. ROBERT B. JONES, who was one of the Clackamas County Commissioners when Lafferty was retained in 1952:

"That Mr. Lafferty was retained on a very meager basis by Clackamas County, receiving $200.00 a month for expenses, and we anticipated that his fee would be awarded by the Court at the successful conclusion of the case. . . . That in my opinion A. W. Lafferty is entitled to a substantial fee from the fund that was preserved and paid to the eighteen Oregon counties".

3. DARRELL JONES, presently a County Commissioner of Clackamas County:

". . . That from my personal knowledge Mr. Lafferty has spent long and tedious hours in the preparation of Clackamas County's law suit against the Secretaries, not only on behalf of Clackamas County but for the benefit of the entire eighteen Oregon counties that were involved in the Oregon and California land grant controversy. That I have spent many hours with Mr. Lafferty and know that he has spent most of his time for many months in the preparation and prosecution of Clackamas County's law suit. . . . I can heartily recommend that Mr. Lafferty be paid a substantial fee out of the fund . . . which was later distributed under Public Law 426 which parallels and confirms the earlier Court decision and was so testified to by a Member of the Oregon delegation in Congress".

(County Judge Wallace R. Telford and County Commissioner Stanley Skoko, of Clackamas County Board of Commissioners, made similar affidavits, similarly Filed as above).

4. MERVIN SHOEMAKER, the political writer for the Portland Oregonian:

> "That I am well acquainted with the plaintiffs in this suit, and particularly A. W. Lafferty, and that I am well acquainted with his efforts in the prosecution of the law suit of Clackamas County. . . . That to my own knowledge I know that the plaintiffs, and particularly A. W. Lafferty, have through the years been dedicated completely to a successful result for the eighteen Oregon counties in the controversial land grant problem".

Besides the foregoing convincing local testimony, my own affidavit, dictated over a year ago by me in Mr. Donald C. Walker's law office in Portland, Oregon, is omitted from the Joint Appendix, except in expurgated and almost meaningless form. I shall ask indulgence of the Court to read my own complete affidavit to the Court at the oral argument, February 18, 1957, as it was Filed Feb. 11, 1956. But I shall, as I always do, defer to the wishes of the Court next Monday, as to how much time, if any, I shall consume, and what angles I shall discuss, if any. The convenience of the Court, and its desires will be my guide. The Court may be ready to rule on this case, and from its own knowledge.

Again, As to Suitable Fee for Merrick and Lafferty

Hon. Byron N. Scott, of the local bar, and Mr. Donald C. Walker, partner in the Portland, Oregon, law firm of Crum, Walker and Buss, appeared for Mr. Merrick and myself in the Court below, although the original suit for fee was brought much earlier by Mr. Merrick, and Merrick wrote the original Complaint for himself and myself. Scott and Walker came in much later.

I have just received a letter from Mr. Walker that he will arrive here at Mayflower Hotel, for Monday's hearing. He has previously told me his expenses here a year ago, of three weeks or more, all told were near $1,000. Mr. Walker also, a year ago suggested I agree to pay my attorneys in this case a fee of 40 per cent of the recovery, and he showed me the printed fee schedules of the Oregon State Bar, which would make such a fee reasonable in ordinary, run-of-the-mill cases taken on a contingent basis.

I countered that if I win I will not haggle over paying any reasonable bill for fee and out-of-pocket expenses Mr. Walker may present, and I will, and the same goes for Mr. Scott. Mr. Scott has just written me that he will present his bill, if I win. It will be paid, of course, out of the recovery.

Now, as previously stated, if this Court declares a suitable fee for Merrick and myself at $600,000, as asked in the Complaint, upon which a motion for summary judgment in our favor is pending in the Court below (See Joint Appendix, p. 19) that would be approximately a gross fee to each of us of 3 per cent of the nine million dollar trust fund, the dispute as to which was resolved in the suit prosecuted by us successfully, and with "meritorious results" to the 18 Counties. Out of that we would have to pay our own attorneys, and income taxes would take a major portion of the remainder. Concluding, as to this point, Pro Se, I regard the fee of $600,000 reasonable, the law plain, and the evidence adequate for an immediate decision.

Secretaries Humphrey, Seaton, and Benson Do not Oppose this Fee Suit

A Memorandum Brief has been filed herein by the Department of Justice declaring the Secretaries to be neutral, but that the Government will require proper ac-

quittances from each of the 18 counties. That 17 of the 18 counties are properly before the Court, and will be bound by any decree, is not questioned.

In this connection attention is called to p. 13 of the Joint Appendix, where Co-Appellant Merrick, purporting to act for himself and myself, on April 18, 1955, moved to dismiss as to Clackamas County only, without prejudice, "upon the ground and for the reason that an agreement has been reached with said defendant for the payment of a proportionate part of the fees of plaintiffs involved in this action".

That motion was allowed May 4, 1955.

Perhaps that awkward situation, which I think was a procedural mistake on the part of Mr. Merrick, and not participated in by me, can be cured by this Court's going ahead and declaring a fee, but providing in the decree that the pro rata share of Clackamas County, only 5.92 per cent of the total fee to be allowed, shall not be turned over to Appellants until such time as Clackamas County delivers to the Secretary of the Treasury an unconditional acquittance, based upon an order of its County Court.

It is a foregone conclusion, from the evidence now before this Court, that Clackamas County would cheerfully give such an acquittance. But candor compels me to say that I do not know of any formal agreement, as referred to in Mr. Merrick's motion. Last Summer, while in Oregon briefly, I visited Oregon City, the seat of Clackamas County, and inquired of the members of the County Court as to this phase, and was told that they knew of no formal order of their county court, which can only speak by its records, of such an agreement.

If there is any defect of parties, now, or non-joinder of all necessary parties, as a result of Mr. Merrick's motion, which I did not know of, and therefore could not have approved of, have never ratified, and do not ratify

now, then I would ask that this case be remanded, the order dismissing as to Clackamas County vacated, and that Clackamas County be reinstated as party defendant, and duly served with process accordingly.

But I believe the Court of Appeals can properly proceed to final judgment for appellant, as it surely has the power to do, and it ought to do to save its own time and labors, and expedite justice. Clackamas County has paid me no fee whatsoever, or indicated any willingness to pay me any fee whatsoever, until this case is finally adjudicated, which happy end I hope is near.

Extravagant Statements in "Brief for Appellees Benton County Et Al"

On page 5 of the brief filed by Messrs. Paul R. Connolly and Frank S. Sever, Hogan & Hartson of counsel, is the following statement:

> "The plaintiffs dismissed their action as to Clackamas County on the ground that Clackamas had agreed to pay them a fee. (J. A. 13)."

Merrick's motion, though ill-timed and unauthorized by me, nor would I have permitted it had I been *sui juris*, read entirely different to the foregoing rash statement of counsel. Merrick's motion said "upon the ground and for the reason that an agreement has been reached with said defendant for the payment *of a proportionate part of the fees of plaintiffs involved in this action*".

"Proportionate" part could mean nothing else than *pro rata* share of the total fee due, in equity, from the entire 18 counties.

The testimony before this Court shows that such is in fact the attitude of Clackamas County officials, though I know of no agreement, by court order there, confirming it.

Foot note 4 of opposing counsel's brief is shot through with even greater lack of candor:

> "4. The District Court's memorandum opinion states that the seventeen counties concede that a fee would be appropriate if the litigation instituted by plaintiffs had been productive of the distribution of the fund. *This concession was made for the purposes of the motion only.*"

Would counsel concede as being law, that which was not law, for purposes of a motion only? We don't get it.

Again, counsel's foot note 3, p. 3 of their brief says their action 175-55 pending below is merely to compel distribution of the remaining $800,000 "on the ground that there is no authority for withholding payment". But that is their "amended complaint" filed long after their original complaint of January, 1955, in 175-55, which original complaint asked for the identical relief suit 11844 had granted, and was almost identical with Clackamas County's original suit. When filed no part of the nine million dollar fund had been distributed. Pendente lite checks were sent out to the counties for all but $800,000, still held. Query? Was it not opposing counsel's intention in filing their original complaint in 175-55 to claim at the foot of judgment that *they* had compelled distribution, and that *they* were entitled to a fee for the whole distribution? If Appellants here, are cast out of Court, will *they* not reinstate their original complaint, and yet ask a huge fee out of the remaining $800,000?

On page 5 of their brief counsel make the following astounding statement:

> "Clackamas County, either piqued or prompted by the supposed interests of its attorneys, filed suit attacking the constitutionality of Public Law 426".

That suit, 3939-54 in District Court here, and 12533 in this Court of Appeals, was brought Sept. 16, 1954, by

order entered of record in Clackamas county court, and approved by its District Attorney.

The suit did not attack any portion of Public Law 426, except the solitary subsection thereof transferring the 472,000 acres to the Forest Reserves. It admitted the legality of all parts of Pub. 426 except that one isolated and detached clause. The suit did not, and could not had it prevailed, have any bearing whatsoever with the immediate carrying out of all other portions of Pub. 426, including the immediate distribution of the escrow fund of nine million dollars in question here. See the record in that suit confirming this statement.

Conclusion

I have touched but a few angles of the momentous question of Oregon's special rights in the O & C Land Grant, a checker-board grant of odd-numbered sections 60 miles wide, 300 miles long, running from the Columbia River to the California border, and now worth over two billion dollars. Senator Clinton Anderson testified at the hearings on S. 2225 (Pub. 426) May 4, 1954, that what study he had been able to give the matter when Secretary of Agriculture convinced him that all beneficial interest in the lands undoubtedly "belonged to the people of Oregon." Hearings, p. 12 and 13.

Every Act of Congress to this hour, from 1916, gives Oregon all the income from the lands, except costs "of administration." Is Clackamas County, a sovereign subdivision of Oregon, to be branded as "piqued" for having tried to protect Oregon's every right? And this Court's decision, we submit, in that so-called "sovereign rights" suit (12533) was most helpful, and sympathetic to Oregon. Please see it.

The original O & C Land Grant enforcement litigation, 238 U. S. which please see, was started by me Sept. 16,

1907. Justice McKenna states in the opinion that my suit was filed "a year ahead of the Government suit and that my client was joined in as cross-complainant". The litigation was argued for 3 full days in each of the Courts through which it passed. I participated in all the arguments. Justice McKenna ruled out forfeiture, and held that Congress could legislate further within the framework of no forfeiture. Therefore, when the phrase "revested O & C lands" is used, it does not mean "forfeited" lands, or "re-captured" lands, but does mean "unforfeited" lands, placed in the Interior Department "for administration". "A ministration" over 472,000 acres thereof was yielded to Agricultural Department by an isolated subsection of Pub. 426. Let us hope, notwithstanding, that Congress will continue to vouchsafe to Oregon all the income from these 472,000 acres, save costs of administration. All the O & C lands are in Oregon, total 2.5 million acres. Over 2 million acres thereof are still under Interior Department for administration, and now yielding from timber sales alone over 25 million dollars a year, 75 per cent of which goes to 18 Oregon Counties, to relieve their burdens.

The Forest Service claimed 16 years ago that the 472,000 acres were not O & C lands, but forest reserve lands. This in spite of Judge Wolverton's decision in the case, brought by the Government itself in 1925, to determine just what were and what were not O & C lands. It was this dispute that this Court of Appeals resolved in 11844 in favor of Clackamas and the other 18 Oregon Counties, entitled to 75 per cent of the frozen trust fund if they were O & C lands and only 25 per cent if not. That portion of your decision in 11844 *was not* made "moot", nor was your holding that Secretaries can be sued when they do not perform ministerial acts, as commanded by Congress.

Your Court held 11844 under advisement for 5 months, and your Judges and their law clerks and helpers, per-

formed a mountain of work upon it. Is that work now to go for naught, and held a complete "nullity" as asked by opposing counsel?

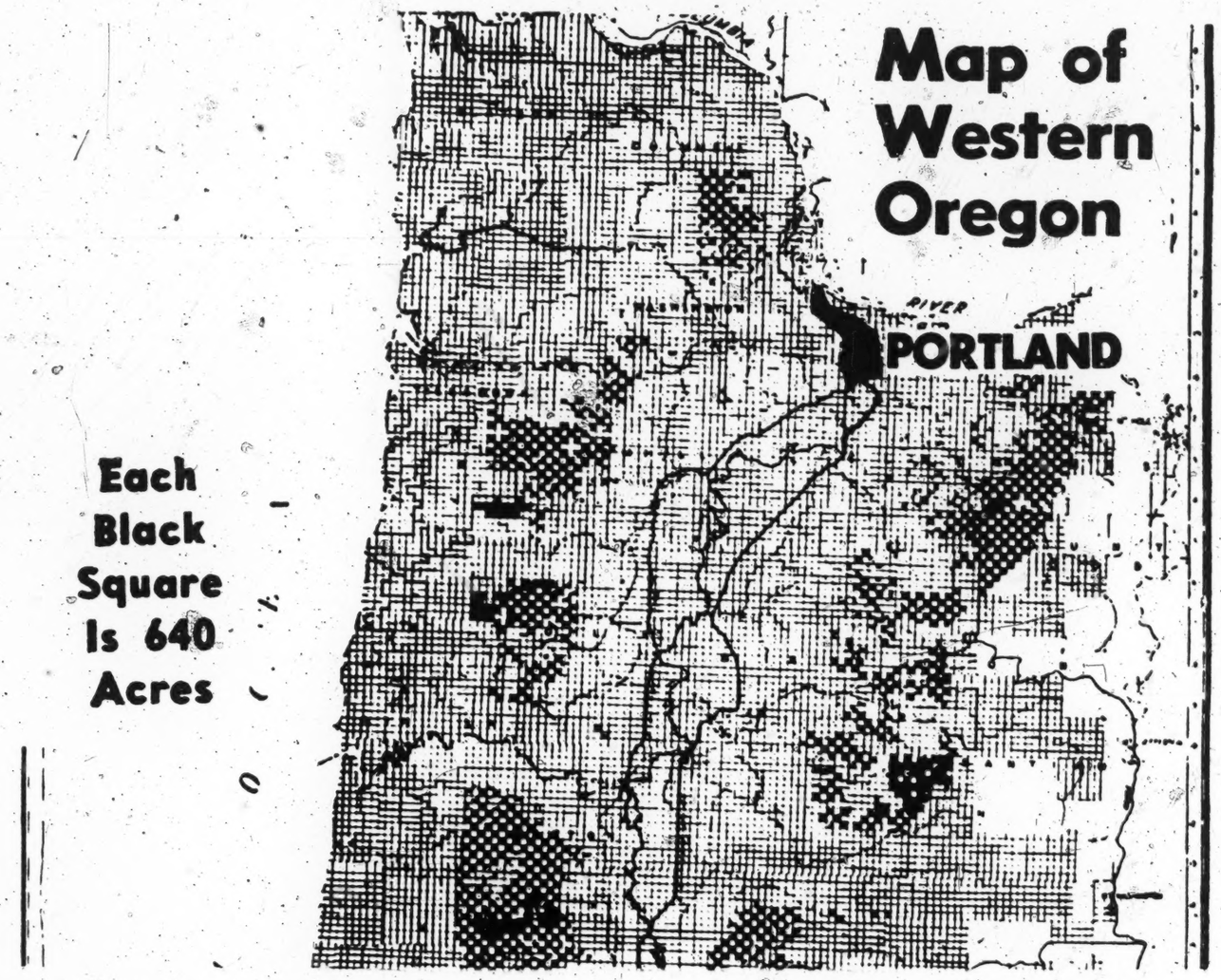
Concluding, I am greatly comforted by the thought that while my efforts are feeble and weak, this suit for compensation is now in the hands of this Court, whose Judges will be able to see the case correcly in all its aspects and future implications to Oregon and the general welfare of the United States.

Respectfully submitted,

A. W. LAFFERTY,
Pro Se.

APPENDIX – D

Map Showing Just Where The O & C Lands are Located In The State of Oregon



The Oregonian

EDITORIAL here reproduced from Editorial Page of the Sunday Oregonian, of Portland, Oregon, of June 30, 1957.

--A. W. LAFFERTY

For Lafferty Settlement

County courts of the 18 western Oregon counties in which Oregon and California grant lands are located would do well, it seems to this page, not to concur in the decision of the executive committee of the O&C Counties Association to take the A. W. Lafferty-Richard L. Merrick legal fee matter to the Supreme Court.

There is considerable basis in fact for the recent Court of Appeals opinion that litigation, which Mr. Lafferty, assisted by Mr. Merrick, undertook on behalf of Clackamas county, hastened the settlement of the long dispute between the Agriculture and Interior Departments over 472,000 acres of forest land. Congress on several occasions had failed to pass bills determining jurisdiction, but acted fast after Lafferty and Merrick won a favorable decision from the Court of Appeals in 1954.

Since the court decision and the action by Congress, some $7,000,000 has been divided among the counties in back revenues on the O&C formula of 75 per cent to the counties and 25 per cent to the federal treasury. If, as the Washington, D. C., court held, Mr. Lafferty and Mr. Merrick helped bring that about, they are entitled to compensation for their efforts.

One must grant that Mr. Lafferty attacked the O&C problem in unorthodox ways, and in opposition to tactics approved by most of the counties. But he remained firm for the 75-25 formula when some others, including Ex-Senator Guy Cordon, were willing to settle for 50-50.

The case has human as well as legal aspects. Mr. Lafferty is old, infirm and almost destitute. If, after further litigation, it should be determined he was, indeed, entitled to a fee and he no longer were here to enjoy it, some Oregonians' consciences might bother them.

Better than fighting the case further in the courts would be an attempt by the counties to arrive at an agreement as to what constitutes a reasonable fee.

Oregon Voter

Economic, Financial, Taxation and Public Affairs Review of Oregon and the Pacific Northwest

43rd Year, No. 29 PORTLAND 5, OREGON, U.S.A. July 20, 1957

Entered as Second Class Matter May 1, 1915, at the Postoffice at Portland, Oregon, U.S.A.

PAY LAFFERTY

The Oregonian's Stand Sound

We commend highly to authorities of the 18 O & C land-grant counties the editorial in *The Oregonian* June 22 "Fee for Mr Lafferty" in which the newspaper made a sound case for the payment of attorney's fees to the former Oregon Representative in Congress A W Lafferty and his associate Richard L Merrick within the $600,000 withheld from the $7,000,000 allocated to the counties when they were legally allowed 75% of the revenues from the controverted O & C lands instead of the 25% they would have received had they been classified as Forest Service lands.

Although the actual classification as O & C lands was ordered by Public Law 426 the history of that controversy shows that it was Mr Lafferty's suit and which he won, that preceded and was pending when Congress acted and except for Mr Lafferty's long and well-informed fight to have it done, it is doubtful there ever would have been the law, under which all O & C counties benefitted.

It is not of consequence now that 17 of the 18 counties in the O & C group did not hire Mr Lafferty to work for the 75% allotment of revenues and, we think mistakenly opposed his effort. Clackamas county stood alone in providing the small but important retainers to Mr Lafferty to get the suit started. Clackamas county furthermore did so against some powerful pressures. But Mr Lafferty was right and although he met rebuff after rebuff he had knowledge of the history of O & C lands such as few others alive had and he won in court. In his late seventies and with most meager resources he fought for Oregon in this and other respects valiantly, until he was threadbare in vitality and resources, and his health impaired. Toward the end of the successful litigation he had the aid of former US Senator Guy Cordon and former Representative Harris Ellsworth, eventually sponsors of the law by which the counties received the 75% instead of the 25%, by statute.

The 17 counties have announced they will carry to the US Supreme Court the decision of the Court of Appeals directing the lower court to determine the fees. Lafferty and Merrick had won in the lower courts the 75% allotment of revenues for the counties but in view of the action of Congress during the litigation the lower court dismissed the action for fees.

The Appellate Court held that passage of the law classifying the lands did not alter the fact that the legal character of the lands was determined by the court, and that the fees were proper.

In human fairness the 17 counties should no longer oppose payment of the fees. All of these counties now receive or have received millions they might never have received except for the Lafferty original action. Classification of the lands became an issue leading to the law because the issue had been raised by Mr Lafferty. He is entitled to the fee in his advanced years and poor health; he needs it and should have it for his work. Likewise Mr Merrick for his.

EDWARD F. COLLADAY
DAVID C. COLLADAY
JAMES R. STONER

COLLADAY & COLLADAY
COUNSELLORS AT LAW
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1331-1333 G STREET, NORTHWEST
WASHINGTON 5, D. C.

TELEPHONE
NATIONAL 8-0791

CABLE ADDRESS
COLCOL

June 18, 1957

Honorable A. W. Lafferty
518 H Street, N. W.
Washington 1, D. C.

Dear Mr. Lafferty:

I appreciate very much your sending me a copy of the decision of the United States Court of Appeals for the District of Columbia Circuit decided in your favor on the 13th instant. Please accept my congratulations for your success in this case of such great importance to you.

Sincerely yours,

E. F. Colladay

E. F. Colladay

EFC:alf

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MAIN 1-1740

July 1, 1957

Mr. A. W. Lafferty,
518 H Street, N. W.,
Washington 1, D.C.

Dear friend Lafferty:

Please accept my congratulations on the opinion, copy of which you sent me, of the United States Court of Appeals in your case. I do hope you shall soon have collected a fee commensurate with your work and that such fee will be a great comfort to you.

With cordial best wishes and thanking you for your thoughtfulness in sending me said copy, I am

Sincerely yours,

Forrest C. Donnell

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KENNETH WELLS PARKINSON
EDWIN R. SCHNEIDER, JR.

CABLE ADDRESS
"BINGHAM"

TELEPHONE
DISTRICT 7-2141

June 19, 1957

Honorable A. W. Lafferty
518 H Street, N. W.
Washington 1, D. C.

Dear Mr. Lafferty:

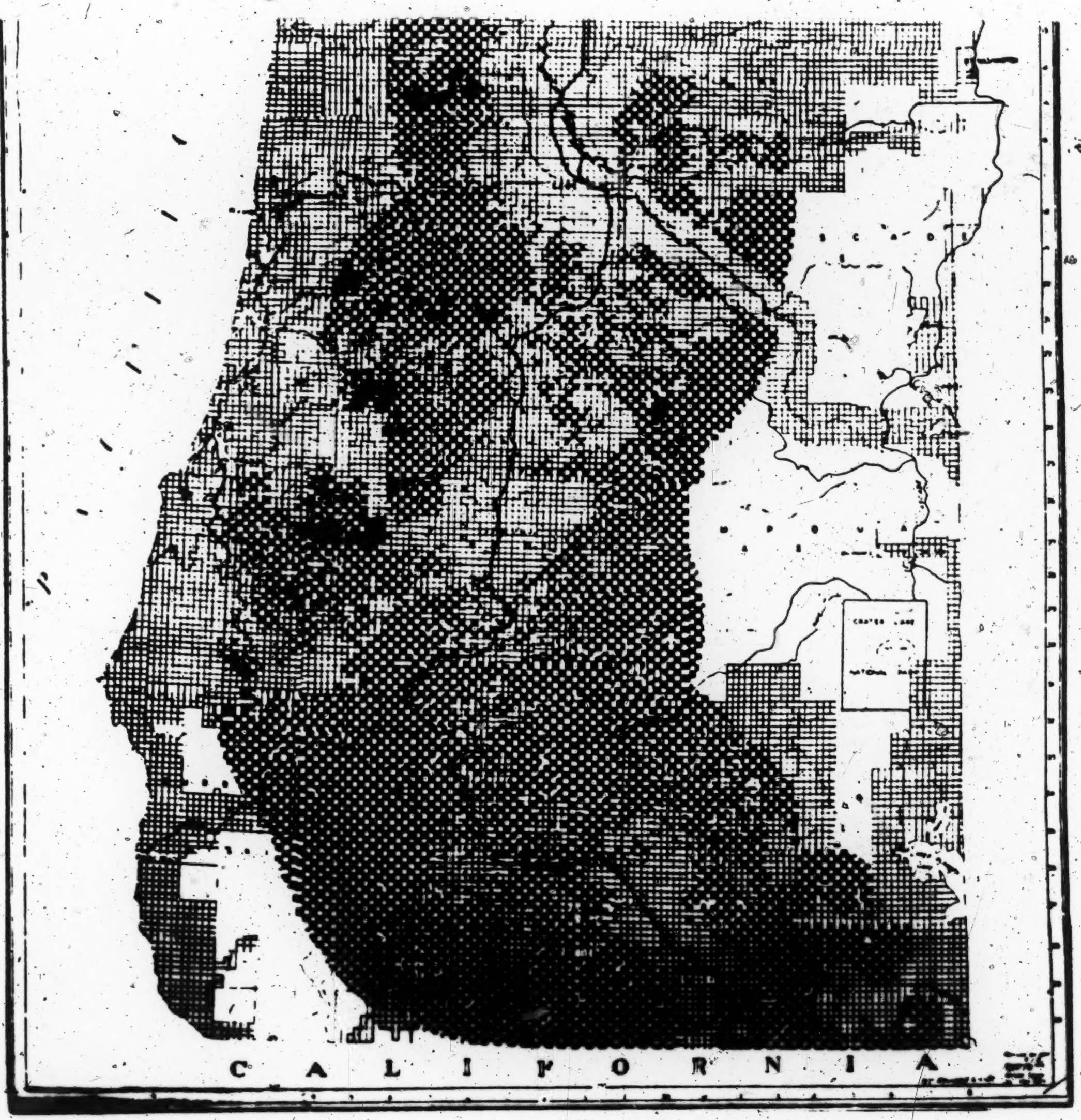
I do not know when I have read anything that has delighted me any more than the decision of the Court of Appeals handed down on June 13, 1957.

This is a perfect example of what perserverance will do and how right will eventually triumph. I certainly hope the Court below will give you an ample and just fee for your life's work. God knows you deserve it.

In the meantime, my heartiest congratulations and best wishes to you.

Sincerely yours,

Linton M. Collins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House of Representatives
Committee on Appropriations
Eighty-fifth Congress
Washington, D. C.

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TELEPHONE:
NATIONAL 8-3120
EXT. 215

June 24, 1957

Hon. A. W. Lafferty
518 H Street, N.W.
Washington 1, D.C.

Dear Congressman Lafferty:

Much gratified to note the favorable decision handed down June 13 by the Court of Appeals. All is well that ends well.

It is a further exemplification of the old adage "be sure you are right and then go ahead." In this particular case we might also add the injunction of Admiral Farragut "go ahead and damn the torpedoes."

With heartiest congratulations and warmest regards,

Your friend,

Clarence Cannon

CC/dc

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House of Representatives
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Eighty-fifth Congress
Washington, D. C.

June 24, 1957

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